



New England Cable & Telecommunications Association, Inc.

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**WRITTEN COMMENTS OF THE NEW ENGLAND CABLE &
TELECOMMUNICATIONS ASSOCIATION IN OPPOSITION TO HOUSE BILL 7187**

**AN ACT RELATING TO PUBLIC UTILITIES AND CARRIERS – COMMUNITY
ANTENNA TELEVISION SYSTEMS AND INTERNET SERVICE PROVIDERS**

February 9, 2022

Good evening Chair Ruggiero and esteemed Members of the House Innovation, Internet and Technology Committee. My name is Tim Wilkerson, and I am President of the New England Cable and Telecommunications Association (NECTA).

I. Introduction

NECTA is a five-state regional trade association representing substantially all private cable broadband providers in Rhode Island, Connecticut, Massachusetts, New Hampshire, and Vermont. In Rhode Island, NECTA represents Cox Communications. In a recent economic impact study conducted by Dr. Tebaldi of Bryant University it was concluded that Cox produces nearly \$700 million annually in economic output and labor income for the state and employs approximately 800 Rhode Island residents. Cox also generates \$35.6 million in tax revenues for local and state governments and between 2020 and 2023 Cox is targeting to add \$197.5 million in capital investments.

I appreciate the opportunity to testify on behalf of Internet service providers’ (“ISPs”) and their longstanding commitment to the “net neutrality” principles ensuring an open Internet and to call for congressional action to codify these protections at the national level under a clear, modern and enduring law. Given the new leadership at the Federal Communications Commission (FCC) under the Biden Administration, it is anticipated that a new proceeding to reinstate net neutrality conduct rules will be initiated in the very near future, making state action on this unnecessary.

In the five years since state policymakers attempted to mandate ISP compliance with “net neutrality” principles through the passage of laws or executive orders, no cable broadband provider has violated these important consumer focused principles. In Rhode Island, similar efforts have been attempted by advocates warning of the potential threats to the customer experience. Despite these warnings, no NECTA member or other major ISP has broken any existing state and federal law by violating “net neutrality” tenets and upending the user experience.

It is quite the opposite. During the past five years—and for decades before—our members have invested billions of dollars into their broadband networks to ensure they exceed ever expanding consumer demand. Our network strength had the capacity to meet the pandemic driven demand for more Zoom meetings, distance learning, telemedicine, and binge-watching television, among others. NCTA, the Internet and Television Association, launched a dashboard of aggregated data

from cable Internet service providers during the height of the COVID-19 pandemic to offer an ongoing depiction of how cable broadband networks were faring, and this dashboard showed that even with sharp increases in usage and peak demand, cable broadband networks continued to have more than enough capacity to meet consumer demand and maintain high speeds. Those robust networks are the byproduct of continuous and intensive capital network investments and upgrades. Providing world class Internet speeds is the hallmark of our companies, and not diminishing their experience through arbitrary or intentional violations of “net neutrality.”

II. NECTA Members’ Ongoing Commitment to Net Neutrality Principles

NECTA members do not block, throttle, or otherwise interfere with the lawful online activity of our customers and have consistently reaffirmed these commitments since the Federal Communications Commission’s (“FCC’s”) first articulation of open Internet principles in 2005. It is important to underscore that these commitments are more than a mere pledge. They are a part of our companies’ operating DNA.

The FCC’s revised Transparency Rule, adopted in its 2017 Restoring Internet Freedom Order (“*RIF Order*”), expressly requires ISPs to disclose any blocking, throttling, or other conduct that might harm the open Internet—and the FCC has made clear that commitments made by ISPs not to engage in such conduct are legally enforceable by state and federal agencies¹. These mandatory disclosures thus represent robust, clear commitments to their broadband customers to uphold an open Internet.²

III. Overview of Existing State and Federal Oversight and Enforcement

Today the State Attorneys General, the Federal Trade Commission (“FTC”), the FCC, and the United States Justice Department (“DOJ”) have well established authority to protect consumers and preserve the open Internet.

The FCC’s *RIF Order* returned online consumer protection authority to the FTC, the “top federal cop on the beat” for the past twenty years. Importantly in 2018, the Court of Appeals for the Ninth Circuit reaffirmed that the FTC may investigate and bring actions against Internet companies for illegal activity. Therefore, the FTC has the authority to vigorously pursue investigations and enforcement actions against any ISP for unfair, deceptive and anticompetitive practices, including where an ISP engages in conduct that is at odds with its public disclosure notices, marketing, advertising and promotional materials.

Additionally, the FCC, in coordination with the FTC, continues to require ISPs to publicly disclose information about their practices to consumers. Moreover, the DOJ can enforce antitrust laws if ISPs interfere with lawful online content in a manner that harms competition and consumers. And at the state level, Attorneys General can sue ISPs who engage in unfair or deceptive trade practices under existing state consumer protection laws, provided they act in accordance with federal law in doing so.

¹ FCC Open Internet Transparency Rule: <https://docs.fcc.gov/public/attachments/DOC-328399A1.pdf>

² Atlantic Broadband Disclosure: https://atlanticbb.com/sites/default/files/Network_Management_Practices_7_24_19.pdf

Comcast Disclosure: <https://www.xfinity.com/policies/internet-broadband-disclosures>

Charter Disclosure: <https://enterprise.spectrum.com/legal/network-management-disclosure.html>

Cox Communications Disclosure: <https://www.cox.com/aboutus/policies/internet-service-disclosures.html>

IV. Federal Law Preempts State Attempts to Impose Net Neutrality Requirements, Including Through Conditions on State Procurement of Contracts or Similar Measures

While states may enforce generally applicable statutes to prevent fraud, deception, and the like, federal law prevents states from imposing their own net neutrality mandates.

In its decision upholding the FCC's *RIF Order*, the D.C. Circuit held that whether a state law is preempted by federal law must be decided on a case-by-case basis. The court also made clear that, although the FCC could not preempt all state laws in advance on a blanket basis, a specific state law will be invalidated under the conflict preemption doctrine if it is inconsistent with the FCC's light-touch framework³. In particular, the D.C. Circuit reaffirmed the well-established principle that, if a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of Congress or the FCC, then it will be struck down pursuant to the Supremacy Clause of the Constitution.

State measures that impose net neutrality requirements are highly likely to be struck down under conflict preemption principles. The D.C. Circuit has previously made clear that categorical bans on blocking, throttling, and paid prioritization constitute common carrier requirements. The FCC's *RIF Order* expressly repealed such rules and found that ISPs may not be subject to common carrier requirements, so a state law re-imposing such requirements would necessarily conflict with the FCC's order and federal policy.

Even apart from the prohibition against treating ISPs as common carriers, the Internet is quintessentially interstate in nature, and it is impossible to segregate any distinct intrastate component. That impossibility creates another basis for preemption, and it also means that state regulation would violate the Commerce Clause by unduly burdening interstate commerce and dictating how the Internet would be regulated outside the state.

Federal courts also have found that states may not directly or indirectly circumvent preemption by using their spending powers to regulate broadband service. The Supreme Court has clearly ruled that a state may not use its spending power as a means to regulate indirectly what it is preempted to regulate directly. Under the market participant doctrine, the Supreme Court has found that a state may not impose conditions on the procurement of products and services for its own use where such conditions extend to *consumer* services as well. As the Court has explained, such procurement conditions are, for practical purposes, equivalent to state regulation and thus are subject to preemption.

V. Net Neutrality Litigation

Over the course of 2018 and 2019, various states passed net neutrality legislation or issued executive orders instituting net neutrality requirements in state procurement.

There is now litigation in two states over these state-enacted laws – California and Vermont. Within hours of California Governor Jerry Brown signing SB822, the DOJ originally sued to block the law, arguing that it is preempted by federal law. The DOJ opted to no longer pursue the case due to the change in administrations, and in February 2021 a federal judge denied a motion for preliminary injunction brought forth by a broad set of industry participants, allowing the California law to take effect while the litigation is ongoing. A more recent ruling out of the Ninth

³ <https://www.aei.org/technology-and-innovation/the-fcc-wins-big-on-net-neutrality-what-it-means-and-whats-next/>

Circuit upheld the denial of the preliminary injunction, but this ruling concerned only whether a preliminary injunction was warranted to prevent encroachment of California's law while challenges to the law proceed. This ruling does not mean that states are permitted to enact net neutrality rules that conflict with the FCC's light touch framework. There has not been a final judgement on the merits, and the California lawsuit remains underway in the trial court.

Industry also filed a suit to stop Vermont from enforcing its procurement-based net neutrality law and executive order. The Vermont litigation is still pending. Litigation in both of these states is expected to continue for some time.

VI. NECTA Supports Bipartisan Congressional Action to Establish Enduring Consumer Protections by Codifying the Net Neutrality Principles to Ensure an Open Internet

While the reinstatement of the FCC's net neutrality conduct rules are imminent under the Biden Administration, a wide variety of ISPs, including wired, wireless and satellite providers also support congressional action to enact bipartisan legislation at the national level that preserves the principles of no blocking, throttling, or unfair discrimination of lawful Internet traffic. ISPs supported the FCC's repeal of the 2015 *Title II Order* to end the ongoing regulatory ping pong of federal oversight between Democratic and Republican controlled FCCs. The four-year-old *Title II Order* reversed two decades of proven bipartisan federal oversight of ISPs and, in its place, imposed an archaic, legacy regulatory scheme that was originally established in the 1930s to regulate telephone companies.

Without congressional action, net neutrality will continue to be a political football that diverts time and resources away from innovation and job creation. By permanently rejecting outdated, 1930s style Title II regulations and adopting a modern federal framework, Congress would achieve the right policy balance of government oversight of ISPs while fostering private investment and market competition.

VII. Overview of Rhode Island's Vibrant and Competitive Internet Ecosystem and the Disruptive Risks and Unintended Consequences of State Regulation of ISPs

Historically, Rhode Island has adopted a modern, light-touch regulatory regime over the communications marketplace that spurred industry competition leading to a convergence of residential and business consumer video, broadband, voice, and wireless offerings from new service providers at lower costs. As a result of this approach, the network quality and diversity of products offered by companies in Rhode Island is virtually unparalleled. This is evidenced by Rhode Island's ranking as the most broadband-ready state in the nation according to the National Broadband Map (broadbandmap.gov). Competition in the state has afforded nearly every Rhode Islander the opportunity to choose from multiple ISPs, and the investment these private companies have made in fiber technology has positioned Rhode Island as, by far, the most fiber-accessible state.

Over the past decade, NECTA members' maximum Internet speeds have increased dramatically. Residential Internet speeds in Rhode Island, delivered through approximately 8,000 network miles and nearly 2,000 miles of fiber, reach speeds of up to a Gigabit. For business services, Rhode Islanders have access to up to 10 Gigabits of speed to meet the needs of any retailer, university research and development facility, financial services company, or hospital. Our

provider has also consistently ranked among the highest in customer satisfaction for business services according to JD Power.

Importantly, Rhode Island cable broadband providers completed a DOCSIS 3.1 technology deployment in 2019 resulting in faster, more reliable data speeds and features. The next major upgrade in Rhode Island will be DOCSIS 4.0. This technology is a major step toward reaching the industry's ubiquitous 10 Gigabit or 10G goal resulting in: higher speed, lower latency, increased security, and higher reliability for residential and business customers. Today, Cox already offers Cox Optical Internet state of the art 10G scalable Internet for their enterprise customers.

Because of the predictable regulatory environment and the ISPs' billion dollar investments in the state's world class 1 Gigabit to 10G capable broadband infrastructure, Rhode Island's overall innovation ecosystem is ready for the continued growth in advanced manufacturing, health care and high tech. Our networks serve as the backbone to that future innovation and job growth.

Today NECTA members' advanced networks and operating systems have the capacity to not only meet but exceed consumer demand. Our members' network superiority is highlighted by Rhode Island consistently being ranked number one nationally for fastest broadband speeds in the nation⁴. As ISPs product offerings evolve to increasingly include mobile services, Internet of Things ("IoT") products, telehealth options, and other transformative business lines, the consumer experience is becoming hyper personal. These innovations have been powered by the delivery of broadband services under predictable and national and state regulatory schemes. By enacting legislation (like H-7187) the state of Rhode Island will disrupt two decades of regulatory certainty and contribute to the creation of a disjointed patchwork of inconsistent state Internet laws. Policing the Internet on a state-by-state basis is fraught with risk, costly to both state governments and the private sector.

California's Net Neutrality law serves as a cautionary tale with respect to unintended consequences in the wireless industry. California's law expressly prohibits zero-rating and sponsored data programs, which are commercial arrangements between a provider of a webbased service and ISPs to allow consumers to use the service without counting towards monthly data allotments in a wireless plan. California does not allow content to be excluded from consumer data caps, or usage-based pricing. Unfortunately, these prohibitions now block an agreement between Department of Veterans Affairs ("VA") and ISPs, which allowed Veterans to use the VA's telehealth app for free without counting against their data. This app allows Veterans and their caregivers to meet with VA healthcare providers, order prescriptions, view lab results, etc. Under California's law, all data must be treated the same so the ISPs cannot exempt any data from a consumer's wireless plan including Veterans using a critical telehealth app during a global pandemic. California's law has no exemption for government domains or agreements and services that may be in the public interest. Because California's law can now go into effect, the VA is considering shutting down the app unless the VA can come to an agreement with the California Attorney General. This unfortunate example highlights the risk of a state by state, patchwork approach to regulating a technology as sophisticated as Internet service.

Finally, every school district in Rhode Island (with the exception of Block Island) as well as many libraries and public buildings are wired and receive free and/or discounted services from

⁴ <https://www.bostonglobe.com/2021/04/30/metro/study-rhode-island-has-fastest-internet-speeds-country/>
<https://www.highspeedinternet.com/resources/fastest-slowest-internet>

the local provider. Additionally, broadband adoption is a top priority and our members are bridging the digital divide for thousands of Rhode Island families with programs like Connect2Compete. Before, during and after the pandemic, Connect2Compete plays a critical role in connecting Rhode Island residents who face financial, cultural, digital literacy or other complex insecurities or barriers, such as immigration status, English fluency or literacy, that would otherwise prohibit them from having high-speed broadband.

VIII. Conclusion

NECTA members strongly support and adhere to the principles of net neutrality, including no blocking, throttling, or otherwise interfering with the lawful online activity of our customers. We believe the best way to achieve lasting consumer protections and an open Internet is through a national policy framework that is established through bipartisan federal legislation. States should not attempt to regulate an inherently interstate service such as broadband Internet access when we know federal action on this issue is imminent and without resolution of all outstanding lawsuits in this arena. National legislation codifying these protections under a clear, modern, and enduring framework, along with existing state and federal enforcement authority, will prevent unnecessary disruptions and the unintended consequences that would ensue from a patchwork of state ISP regulation.

For the above reasons, NECTA respectfully opposes H.7187. Thank you for your attention to this testimony and please do not hesitate to reach out with any questions.

Respectfully,

Timothy O. Wilkerson
President