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Gladys Brown Dutrieuille
Chairman

Pennsylvania Public Utility Commission

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Pennsylvania Public Utility Commission
400 North Street
Harrisburg, Pennsylvania 17120
Telephone (717) 787-4301
http://www.puc.pa.gov

Good morning, Chairpersons Boscola and Sturla and Honorable Members of the Joint Senate and House Democratic Policy Committee. I appreciate this opportunity to speak with you today about internet neutrality, commonly called net neutrality, in general and the proposed legislation on net neutrality in HB 544, SB 392, and SB 393, particularly SB 393 given its focus on Commission jurisdiction.

Net Neutrality is a short term that the public uses when they talk about Broadband Internet Access Service or BIAS. BIAS is the service that residential, commercial, and industrial consumers purchase from an Internet Service Provider (ISP) so they can communicate, compile data, do research, or stream video over the Internet. BIAS provides access to Internet content. BIAS is sometimes referred to as the "clicks" of Internet service. However, BIAS relies on physical wireline and/or wireless facilities to provide the necessary broadband high-speed access to the Internet. These physical facilities are sometimes referred to as the "bricks" of Internet service.

Broadband has two challenges. The first is building networks, particularly in higher-cost rural areas. The second is the affordability of BIAS, an issue in urban and rural areas alike. The FCC recognized in 2016 that affordability is the single most important issue when it comes to broadband. But, we're not here to talk about broadband today although I know that the General Assembly and the Office of Administration are concerned about that. However, I will limit my remarks today to BIAS and net neutrality. I have, moreover, provided a summary of information on the interplay of

telecommunications, broadband, and BIAS in Appendix A that was already provided to the General Assembly.

The Commission's current regulatory authority over BIAS is set out in Chapter 30. Chapter 30 requires the availability of BIAS. It mandates that a participating incumbent local exchange telephone company, or ILEC, and an ILEC alone, must make BIAS available at speeds defined to be 0.128 megabits per second (Mbps) for uploads and 1.544 Mbps for downloads. The Commission must ensure that the ILECs comply with the duty to make BIAS available within ten business days of a request at those speeds. There is no Pennsylvania-specific mandate to provide higher speeds or ensure that the content delivered with BIAS is not subject to discrimination between edge[1] or content providers. The Commission is not authorized to permit packet management and prohibit packet discrimination (e.g., data packet delivery at different speeds) or resolve disputes about packet treatment. There is also no direct mandate ensuring that the BIAS provided is safe, adequate, reliable, of high quality, and is affordable. Finally, the BIAS speeds set out in Chapter 30 have been overtaken by time, technological advances, applicable federal standards, and consumer expectations.

This limited jurisdiction does not mean that the Commission has been indifferent to proceedings involving BIAS at the FCC, particularly in defense of Chapter 30. The

[1] Refers to a physical device that can forward Internet protocol (IP) packets between legacy networks but does not actually participate in running a network. It can also be a physical device which can provide users with ancillary service such as voice, data, and video downloading. See Harry Newton, *Newton's Telecom Dictionary* (CMP Books: 2004, 20th Ed.), p. 289. It can sometimes also refer to the content or information stored by a provider of that content or information where consumers land following a search for that content or information.

FCC conducted no less than four major proceedings over the past ten to fifteen years on the legal classification of BIAS under federal law. This legal classification dispute is an issue of paramount importance when it comes to BIAS.

The Commission previously acted, in part, to ensure that the FCC did not preempt the General Assembly's authority to address BIAS in Chapter 30 today or as it may act on BIAS in the future. A copy of those filings is contained in Appendix B.

In those filings, the Commission supported a "modified" Title II common carrier legal classification for BIAS as a telecommunications service and not as an information service. This stands in marked contrast to the cable industry view that their BIAS is a Title VI cable service under federal law and, as such, cannot be regulated under Title II as a common carrier – telecommunications service. The FCC decided otherwise in 2015 and prevailed in that view on appeal. However, the most recent United States Court of Appeals for the District of Columbia (DC Circuit or Court) decision in October 2019 affirmed the FCC's 2018 reversion to the "information service" classification.

By modified Title II common carrier classification, the Commission took the position that BIAS is a type of public utility service, similar to telecommunications, and that the providers, in this case the ISPs, should treat all communications alike. The ISPs should not be allowed to discriminate between communications provided by those with whom they have business relationships compared to those with whom they do not. The

ISPs should be allowed to manage the communications on their networks so long as they do so in furtherance of network management and not communications discrimination.

This "common carrier" approach reflects, in part, the historic view that communications providers are like the post office. They deliver all messages in a non-discriminatory fashion but do not control their contents.

This is an important consideration. All too often, the discussions about the legal classification of BIAS or regulatory accountability or whether that service is a matter of state or federal law is translated into allegations that it is regulating the Internet.

It is not.

The oversight and accountability for BIAS as a communications service is not regulating the Internet any more than setting the time, date, location, quality of service, and the price of stamps for mail delivery is regulating the content of every piece of mail that the post office delivers. Our filings provide a little more detail on the technology, economic, and legal issues surrounding BIAS for your information.

The concern about BIAS boils down to the legal classification of BIAS under state and federal law and who, if anyone, will ensure that BIAS service is safe, adequate, reliable, of high quality, and affordable. The answer to this will largely be controlled by the legal classification question about whether BIAS is a common carrier telecommunications service or a non-common carrier information service.

If BIAS is a common carrier telecommunications service, state and federal regulators can take action to ensure the safety, adequacy, reliability, quality of service and, even, affordability of BIAS. If, on the other hand, BIAS is an information service, the FCC alone has regulatory authority although, as I will explain below, the latest federal Court decision on the FCC's legal classification for BIAS puts that traditional view into question. The Court's October 2019 decision upheld the FCC's latest classification of BIAS as an information service but it reversed the FCC's preemption of state laws over BIAS.[2] The Court ruled that the FCC lacked, in the Court's view, the plenary authority to overturn the laws of fifty states when it comes to intrastate communications.

The main concern of many consumers, citizen groups, and state legislatures, as well as the U.S. Congress and the federal Administration, is that ISPs might use their control of the physical network facilities they own to provide BIAS in a way that disadvantages competitors by providing them degraded access and content delivery services. There is also a concern that they will favor content providers with whom they are affiliated or charge unaffiliated content providers higher rates for similar access transmission or content delivery service. There is another concern that they could favor

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[2] *Mozilla Corporation v. FCC*, Docket No. 18-1051 (DCCA October 1, 2019), slip op. at 144. *Digital Justice Foundation, States of New York, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Massachusetts, Mississippi, New Jersey, New Mexico, North Carolina, Rhode Island, Vermont, and Virginia, and the District of Columbia,* and *New America's Open Technology Institute, Free Press, Public Knowledge, Center For Democracy & Technology, Benton Institute For Broadband and Society, Computer & Communications Industry Association, and National Association of State Utility Consumer Advocates (NASUCA)* Petitions for Re-Argument (December 12, 2019). See Reference in Appendix C.

competitors' content with whom they have better financial arrangements while disfavoring other competitors' content without those same arrangements.

This is the "net discrimination" issue. It is an important one given that over 90% of the nation's "last mile" wireline networks that run to any given consumer's home, office, or business are controlled by two industries: the cable and telephone industries. They are also the only providers of ISP service to their consumers. FCC decisions do not require that other ISP service providers get access to the cable and telecommunications company networks to compete for the delivery of voice, data, and video content.

This October 2019 decision is but one in a series of legal classification decisions addressed by the same federal appellate court in Washington over the last ten to fifteen years. Pennsylvania played a considerable part in that legal history given that two of our major ISPs, Comcast and Verizon, challenged two of the FCC's earlier legal decisions. Those challenges and decisions resulted in remands to the FCC that, in turn, and following a change in administrations, produced the latest October 2019 decision. Appendix C contains those legal decisions to explain the legal history of the legal classification of BIAS under state and federal law.

Why is this legal classification of BIAS, particularly the latest federal court decision, an important factor to consider in the proposed legislation? The main reason legal classification is important is because BIAS plays, and will increasingly play, an indispensable role in our social, economic, and cultural life and medical well-being.

Most of today's consumer-business transactions rely on BIAS or the availability of BIAS, particularly for the delivery of Internet-based video content. Moreover, BIAS is important for video streaming delivery. For example, one streaming video service alone, Netflix, constitutes about 37% of the total internet traffic in North America in the evening[3] and 15% of all global traffic last year.[4] Netflix and YouTube collectively comprise about 25% of all global traffic.[5] Many local, state, and federal agencies rely on BIAS to interact with citizens, especially during emergencies.

It is important given that the FCC estimated in 2009 that it could cost the country about $50 billion dollars to build a network capable of providing BIAS at 10-30 mbps and $350 billion for a network capable of providing 100 mbps.[6] When you consider these costs and the fact that Chapter 30 mandated 1.544 Mbps download speed standard, the investment needed to meet the demand for higher BIAS speeds is considerable.

In addition, the cable (CATV) and telecommunications companies may have 90% of the "last mile" wireline networks running to a consumer's location but they do not use the same technology. The telecommunications companies rely on Internet Protocol (or

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[3] https://time.com/3901378/netflix-internet-traffic/ (last accessed 12/26/19).
[4] https://www.pcmag.com/news/364353/netflix-and-youtube-make-up-over-a-quarter (last accessed 12/26/19). Netflix and Youtube combined make up over 25% of global internet traffic. Amazon Prime is 3.75%, PlayStation is 2.7% *Id.* Amazon is responsible for more than 49% of all online sales and about 5% of all retail sales in the US alone. https://hostingfacts.com/internet-facts-stats/ (last accessed 12/26/19).
[5] IP is a communications protocol originally developed by the Defense Applied Research Agency (or DARPA) to ensure communications would survive a nuclear war. That network did not permit commercial use until that ban was removed in the early 1990's. See, e.g., https://www.pcmag.com/news/364353/netflix-and-youtube-make-up-over-a-quarter (last accessed 12/26/19).
[6] *In re: National Broadband Plan For Our Future,* Docket No. 09-51, FCC Staff Update (September 29, 2009).

IP) to provide their voice (or Voice over Internet Protocol or VoIP), data (research), and video (streaming or fixed channel) content.[7] BIAS is basically a product of government research and funding that was privatized in the 1990s.

That is not true for cable. The cable providers rely on Data Over Cable Service Interface Specification (or DOCSIS). DOCSIS 3.0 was developed by Cable Labs Research, a research offshoot supported by the cable industry.[8] DOCSIS must be "interconnected" with IP networks owned by the telephone companies. This "interconnection" function is important in understanding how consumers get BIAS and can communicate seamlessly when technological protocols vary. It is also why the proposed legislation may want to address the important issue of "wholesale" interconnection for transmission among various network owners and edge providers of content or applications to ensure that this continues.

While these networks do interconnect to provide voice, data, and video in IP, the needs of these IP packets that provide voice, data, and video services are not alike. The routers and services used to provide IP contain "headers" for transmission. These "headers" tell the network operator who owns the packet, what the packet contains, what type of packet it is, where the packet should go, and what priority it should get. The use of this technological function, sometimes called Deep Packet Inspection or DPI, is at the heart of the BIAS and net neutrality debate.

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[7] *See* http://www.inetdaemon.com/tutorials/internet/history.shtml (5/27/10).
[8] Harry Newton, *Newton's Telecom Dictionary* (CMP Books: 2004, 20th Ed.), p. 265.

Voice over Internet Protocol, especially, must have Real Time Priority (RTP) in the transmission of conversations in IP over routers and servers. Without RTP, BIAS consumers will experience latency (sounding like you are talking with an echo) or jitter (pieces of the conversation are dropped). An additional concern arises over ensuring that the RTP for emergency or disaster communications is greater than the priority needed for other voice service let alone data or video content delivery (e.g., 911/E911 emergency voice and data traffic over other voice, data, or video content delivery).

Data or research IP packets, on the other hand, do not need real time priority. Their content can be disassembled and reassembled without the jitter and latency of voice. While these data packets do not need priority, consumers seeking data transmission, typically large institutional entities, are often willing and able to pay a premium for transmission priority. The absence any regulatory oversight, given the network owners' fiduciary duty to their shareholders, could make it easier to prioritize data packets over voice packets as a commercial practice despite their different needs.

Video packets, on the other hand, can get distorted or freeze if they are being sent over a long distance. Local buffering, which stores that content closer to the consumer so it will not freeze, mitigates this problem. This means that video does not need real time priority although buffering may be needed. Due to consumer demand, content providers may be willing and able to pay a premium for video transmission and buffering, especially if they are a big provider like Netflix. That may not be the case, however, with smaller content providers who also need the same transmission and buffering capabilities.

And, again, the absence any regulatory oversight, given the network owners' fiduciary duty to their shareholders, could make it easier to prioritize some video packets over others, even voice, as a commercial practice despite the real difference between them.

As you can see, the need to "read" and "prioritize" IP packets at the routers and servers used to provide BIAS is a key part of the BIAS and net neutrality debate. All packets are not alike and network management which recognizes that is important.

By the same token, how network owners use their routers and servers, or interact with others who use routers and servers outside their service territory, has given rise to concerns about unacceptable or anticompetitive "packet discrimination" compared to acceptable and necessary "packet management" when it comes to transmitting these packets to provide the BIAS service needed for voice, data, and video content. SB 393's proposal to prohibit "paid prioritization" in Sec. 30A01 while permitting "reasonable network management practices" in Sec. 30A01(1) appears to recognize the difference.

This focus on IP packets for voice, data, and video has been limited to the technology used by the telecommunications industry. However, this same concern arises when it comes to the cable industry and its members' use of the DOCSIS 3.0 technology to provide voice, data, and video content on their cable networks.

This difference has legal implications. Telecommunications is a federal Title II common carrier service. Cable is a federal Title VI service, which is not common carrier regulated. For years, the cable industry has claimed that its companies are not

telecommunications providers and that their voice product is not telecommunications. In 2015, the FCC rejected that claim when it classified cable and mobile wireless BIAS as a Title II common carrier service. The cable industry vigorously opposed that classification but lost on appeal. It also does not help that the FCC has had a proceeding underway since 2004 on the classification of VoIP as either a "telecommunications" or "information" service but has yet to decide.[9]

Will a competitor's voice packet get the real time priority it needs compared to the streaming video packet of an affiliated provider who owns the networks serving the consumer? Will a content provider who sells streaming video but owns no network in direct competition with a network owner who owns a network and provides video get the same buffering and transmission it needs so that its content does not freeze? Can a network owner be allowed to manage the "up and down" nature of IP packets, which come in bursts followed by pauses, so that voice quality is not compromised?

Who ensures that the public interest in packet management is consistent across the board regardless of whether a content provider does or does not own the facilities needed to serve end-user consumers? Who resolves disputes between network owners who claim their packet practices are network management as opposed to a provider without facilities who claims they are experiencing packet discrimination?

[9] *In re: IP-Enabled Services,* Docket No. 04-36.

Where will disputes about BIAS be resolved when they inevitably arise? Who ensures that BIAS is safe, adequate, reliable, of high quality, and affordable? Who ensures that network owners provide the interconnection that other transmission owners or edge providers of content and applications will need to reach end-user consumers?

In response to these questions, much of the public discussion about BIAS and net neutrality insists that the best solution is to do nothing or else impose a uniform mandate requiring the equal treatment of all IP packets as if all IP packets are the same. However, all BIAS packets are not the same from a technological perspective.[10]

By the same token, other public discussion recognizes the different needs of IP packets but fails to address how the public interest of prohibiting discrimination can also ensure that there are adequate revenues to finance network upgrades. The focus is usually on preventing an ISP provider of BIAS with a network from discriminating against providers who provide content but do not have networks.

This challenge is compounded by the fact that the FCC does not require an owner of a network to provide access to other ISPs to compete against their networkowner's ISP to provide BIAS and Internet content. That was the practice back in the days of dial-up low-speed access to the Internet but is not the case today.

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[10] Edward W. Felton, *The Nuts and Bolts of Net Neutrality* (Practicing Law Institute: Federal Communications Bar Association), 24th Annual Institute on Telecommunications Policy and Regulation, 2006.

As noted earlier, the current state of federal law is ever-changing. On October 1, 2019, the federal Appellate Court upheld the FCC's January 2018 ruling that reclassified, yet again, BIAS as an information service. That decision reversed the previous FCC order, also upheld by the same federal Appellate Court, which had classified BIAS as a common carrier telecommunications service. The October 2019 decision upheld the information service classification but went on to reverse the FCC's preemption of state authority over BIAS. The Court said the FCC "lacked the legal authority to categorically abolish all fifty States' statutorily conferred authority to regulate intrastate communications."[11]

There are several petitions for an *en banc* rehearing of this decision now pending in the DC Circuit. Any Pennsylvania-specific legislation may be impacted by subsequent federal developments. This warrants consideration of the general suggestions set out below as well as the specific observations about the proposed legislation.

First, the proponents may want to consider a "severability" provision in which any provision in the statute is overturned or preempted by federal law. This ensures that the invalidation of one provision does not summarily invalidate other provisions of the same legislation or the entire statute itself.

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[11] *Mozilla Corporation v. FCC*, Docket No. 18-1051 (DCCA October 1, 2019), slip op. at 144. *Digital Justice Foundation, States of New York, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Massachusetts, Mississippi, New Jersey, New Mexico, North Carolina, Rhode Island, Vermont, and Virginia, and the District of Columbia,* and *New America's Open Technology Institute, Free Press, Public Knowledge, Center For Democracy & Technology, Benton Institute For Broadband and Society, Computer & Communications Industry Association, and National Association of State Utility Consumer Advocates (NASUCA)* Petitions for Re-Argument (December 12, 2019).

Second, the proponents may also want to consider a general provision that authorizes the Commission to act consistent with state and federal law. This may better ensure that if the federal law changes on BIAS and net neutrality, evident in the four decisions over 10 to 15 years, we are better positioned to respond to those changes.

Third, the proponents may also want to develop provisions to ensure that transmission networks can interconnect with each other at the wholesale level and that the Commission can resolve relevant disputes. This is an important consideration because a lot of today's BIAS is provided over an updated public switched telecommunications network but access could be diminished if the services provided over that network are considered information service and not telecommunications. Also, such a provision may better advance the competition goals set out in Chapter 30. Having made these general observations, I shall address the legislative proposals in more detail.

Senate Bill 393. This proposal appears to be consistent with the view that communications services like BIAS are common carrier public utility service. However, there are some areas that may warrant further clarification.

Scope of Commission Authority. For example, Section 30A01 of SB 393 defines "broadband Internet access service" as a "mass market retail service by wire **or radio**..." The provision of BIAS by "radio" is mainly performed by commercial mobile radio services or CMRS wireless carriers.[12] While the FCC's earlier decision prior to the

[12] Fixed wireless BIAS may be provided by wireline telecommunications or communications entities.

current case treated mobile wireless BIAS as a common carrier service, that law is unsettled on how or whether that is retained under the current FCC decision.

Moreover, Section 102(2)(iv) of the Public Utility Code, 66 Pa. C.S. § 102(2)(iv), prohibits the Commission from exercising jurisdiction over the operations of wireless carriers operating in the Commonwealth that are not otherwise public utilities. Title 66 may need to be amended or clarified on any legislative intent so that it is clear whether the Commission can exercise jurisdiction over mobile wireless BIAS as opposed to fixed wireline BIAS for purposes of preventing paid prioritization or packet discrimination. It is worth noting that other states have exercised, and continue to exercise, jurisdiction to address wireless service although only as to terms and conditions of service. That is because federal law prohibits the states from regulating rates or entry except in some circumstances not relevant to today's hearing.

In addition, wireline BIAS is provided by wireline telecommunications carriers that are under the Pa. PUC's jurisdiction, e.g., landline telephone companies, but there are other wireline providers of BIAS that are not. For example, CATV companies that provide BIAS "by wire" to end-user consumers may not be under the Commission's jurisdiction. The proponents of the legislation might want to clarify whether the

Commission can exercise subject matter jurisdiction over BIAS provided by cable companies within the Commonwealth.[13]

Technological Neutrality. It is important to understand that there are other providers of BIAS using other technologies such as satellite, fixed wireless Internet access service providers (WISPs), and, possibly, depending on the results of the upcoming auction of federal support, municipal or county providers. The proponents may need to address whether the Commission has jurisdiction over BIAS regardless of technology, in part to meet the technological neutrality mandate in Section 253 of federal law,[14] or whether the Commission's jurisdiction is confined only to the wireline BIAS of the incumbent and competitive telecommunications carriers that the Commission already regulates.

VoIP Freedom Act. Another issue that may need to be addressed is reconciling the provisions of these proposals with the current VoIP Freedom Act of 2008, 73 P.S. §§ 2251.1 – 2251.6 (*VoIP Freedom Act).* The proposed legislation (SB 393) may need to be reconciled with the *VoIP Freedom Act* for two reasons.

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[13] It is also worth noting that, independent of net neutrality, some states, such as New York, also continue to oversee CATV service.

[14] Section 253 of federal law, 47 U.S.C. § 253, prohibits state statutes or regulations that impede the delivery of interstate or intrastate telecommunications although states can impose, on a competitively neutral basis, and consistent with the universal service mandates of Section 254, requires to promote universal service, protect the public safety, ensure the continued quality of telecommunications service, and safeguard consumer rights.

First, under SB 393, the statutory classification of BIAS as a "public utility service" set forth in Section 102(1)(ix) suggests that the Commission has jurisdictional authority to regulate the rate for BIAS when it is bundled with a VoIP product. This is an important issue because, today, BIAS and VoIP services are often offered as part of a bundled package to end-user consumers where the price is not regulated.

Second, under the *VoIP Freedom Act*, the Commission does not exercise rate regulation or address consumer complaints over retail VoIP services except under a statutorily prescribed set of circumstances (e.g., imposition of certain fees, handling of 911/E911 emergency calls). While there is a limited exception in those circumstances when VoIP is provided as a "protected" service under tariff (typically an ILEC's stand-alone voice service), the same does not hold true for other types of VoIP today. Consequently, the proponents may want to reconcile the authority granted in SB 393 with the *VoIP Freedom Act* when it comes to bundled or stand-alone retail VoIP service that is not protected today or is part of bundled BIAS service.

Paid Prioritization and Preferential Treatment. Given the concern for unacceptable packet discrimination as opposed to necessary packet management and the real differences in the packet needs for voice, data, or video, a blanket prohibition on "paid prioritization" may be controversial. Opponents may view the prohibition, despite the ability and willingness of some content providers to ensure that their data or video packet has priority over the data or video packet of others, as an impediment to getting the revenues needed for network investment. On the other hand, proponents that are less

able to incur the additional costs for a transmission service priority, compared to those with whom they compete and that are able and willing to pay more, may see this as a needed item to ensure that their "edge" service is equal to that of the larger content providers.

If the proponents decide to prohibit paid prioritization as envisioned in the current drafts, there may be a need to clarify through amendment in Section 30A01 (SB 393 at pp. 3-4) that:

a. Network management and prioritization of traffic flows for public safety must occur, particularly real time priority for voice, when it comes to public safety purposes (e.g., prioritization of 911/E911 voice and data traffic) but that this does not constitute "paid prioritization" and should not be the subject of additional costs when the voice, data, or video, or some combination thereof, is for this purpose.

b. Network management and prioritization of traffic flows for lawful purposes undertaken to maintain network quality, safety, reliability, adequacy, and resiliency (e.g., network management for cybersecurity, network management for restoration of service operations to critical infrastructure and anchor institutions such as hospitals and police stations) do not constitute impermissible or unlawful "paid prioritization" when the voice, data, or video, or some combination thereof, is for this purpose.

c. The prohibition on "preferential treatment" set out in proposed Sec. 30A02(3) (SB 393, p. 4) may need to clarify that this "preferential treatment" prohibition does not include a 911/E911 public safety answering point (PSAP) "Internet customer" needs or those of similar entities when they are involved for public safety purposes (e.g., federal, state, and local government authorities involved with national security and/or public safety functions and emergency communications).

d. The same prohibition on "preferential treatment" may want to carve out an express exemption for restoring BIAS to critical infrastructure and anchor institution BIAS customers as well.

Exclusion of Dial-Up Internet Service. Dial-up Internet service was the first form of BIAS and continues to play an important, though diminishing, role. It still remains important for lower-income consumers who may be unable or unwilling to pay the higher rates for Chapter 30 BIAS or BIAS at even faster speeds. While this service may well diminish over time, particularly as public policy supports the deployment of advanced networks that replace dial-up, the exclusion for dial-up in the Sec. 30A01 BIAS definition may warrant reconsideration.

Violations in the Delivery of BIAS. The proponents may need to clarify whether a BIAS public utility who violates the provisions of the proposed legislation violates the Public Utility Code in addition to any violation of the Unfair Trade Practices and Consumer Protection Law, or both. Clarification of this enforcement authority will be important in having the Commission:

a. Promulgate its own rules and regulations "necessary to administer and enforce" the proposed law under Sec. 30A03 (SB 393, p. 5).

b. Adjudicate related actions and assessing penalties even before final rule regulations are put in place.

Consumer Dispute Resolution. The general language in the legislative proposals may need to address the Commission's authority to address the safety, adequacy, reliability, quality of service, affordability, and availability of BIAS to Pennsylvania consumers. This already occurs with telecommunications today and for BIAS under

Chapter 30 although this authority is limited to making BIAS available within ten business days.

The limitation of consumer dispute resolution to only the Unfair Trade Practices provisions of Pennsylvania law could leave consumers bereft of a forum for resolution of their disputes. That could arise in those instances where the Attorney General would not act until a threshold number of clearly identifiable and similarly grouped complaints has arisen. If that threshold has not arisen, consumers with those disputes below that threshold could be unable to avail themselves of the Commission's case-by-case authority as under the current Public Utility Code.

The proponents may also need to consider a provision authorizing the Commission to act consistent with federal law. In the event the FCC asserts plenary jurisdiction over BIAS or the preemption decision is subsequently limited by the *Shreveport-Campion* line of cases, which holds that Congress' interstate commerce authority is plenary and includes intrastate commerce, the absence of a provision allowing the Commission to act consistent with state and federal law could leave consumers with only the distant FCC to resolve their dispute. A provision authorizing the Commission to act consistent with federal law better positions Pennsylvania to resolve disputes in a local and less costly forum compared to the FCC. The *Illinois Payphone* line of decisions requiring the states to enforce federal law as a constitutional mandate could be relied upon for this approach.

The recent "pole attachments" proceeding at the Commission is a case in point. Federal law allows the states to assert jurisdiction although the Commission deferred to the FCC for a number of years. The Commission recently changed that approach in part because parties with pole attachment disputes in Pennsylvania could use a local and less expensive Commission forum compared to the FCC in D.C. While that approach was allowed under federal law, a state law provision allowing the Commission to act consistent with state and federal law could better enable Pennsylvania to address BIAS.

Intrastate Authority and BIAS. As indicated above, the recent federal Appellate Court decision upholding the reclassification of BIAS from a telecommunications service to an information service reversed the FCC's preemption of state authority over intrastate communications. While this language may be read to authorize state regulation, the *Shreveport-Campion* line of cases still holds that Congress' authority over interstate commerce is plenary and can include intrastate commerce, in this case BIAS, if supported by an appropriate preemption analysis.

One possible way to avoid a preemptive action of Congress or the FCC would be to tie the BIAS legislation to the Commonwealth's contract procurement authority. Any legislation under consideration could prohibit the Commonwealth from contracting with an entity that does not abide by the provisions enacted by the General Assembly as set out in SB 393, Section 30A04(b) and (c). Other states have similar provisions.

In that case, Pennsylvania is better poised to defend its legislation as a Tenth Amendment reserved authority over intrastate BIAS. This may better enable Pennsylvania to resist a contrary Congressional determination or subsequent decision of the FCC that would try to interpret this Court October 2019 decision more narrowly in the future than is the case today. And, again, another way would be to authorize the Commission to act expressly consistent with, and in furtherance of, state and federal law.

Other States. I would add that Pennsylvania is not alone in considering BIAS legislation. Laws have been enacted in six states and resolutions or executive orders have been promulgated in many other states. Some states have also invoked their procurement authority to buttress net neutrality and BIAS. References are provided in Appendix D.

In June of 2019, the State of Maine enacted a net neutrality law and prohibition on paid prioritization enforced by the Maine Attorney General.

In 2019, Colorado passed net neutrality legislation.[15] The law is limited to recipients of state broadband grants and provides specific exemptions (waivers) for emergency communications or at the request of law enforcement, public safety or national security governmental authorities and addresses copyright infringement or other unlawful activity. Paid prioritization is noted in Section 40-15-209(1) (b) as an activity

[15] Senate Bill 19-078. It is now codified as Section 40-15-209, Colorado Revised Statutes.

that would make a provider ineligible to receive support, with previously granted support subject to being returned to the state Broadband Board. The Colorado Commission amended its rules to include the legislation (Proceeding No. 19R-0458T, with rules adopted in Decision No. R19-0914). Specifically, Rule 2850 addressed Net Neutrality Violations.

Four other states, California, Oregon, Vermont, and Washington, enacted net neutrality laws. Of those, California and Vermont reached an agreement with the Department of Justice to delay implementation until the pending California lawsuit against that state's net neutrality law is resolved or the ongoing federal appeal is decided.

A recent National Regulatory Research Institute (NRRI) study on state responses to the FCC decision to reclassify BIAS from a telecommunications service to an information service, upheld on appeal in October 2019, reveals a variety of state responses.[16] The study shows that thirty-six states have proposed or passed a resolution, bill, or executive order.

One focus is state procurement. Six states (Hawaii, Montana, New Jersey, New York, Rhode Island, and Vermont) issued executive orders requiring, among other things,

[16]https://pubs.naruc.org/pub/45ACE3A2-AAEA-417D-2416-B6862C9D4435. Last accessed 12/26/19.

companies that contract with state agencies to adhere to net neutrality rules when BIAS had been classified as a telecommunications service.

I want to thank you for the opportunity to provide this testimony and look forward to answering any questions that you may have.