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## MEMORANDUM

**TO:** Kendal Smith  
Director of Policy Development and Legislative Affairs

**FROM:** Public Service Department

**RE:** Public Service Department Risk Analysis of 2018 Net Neutrality Action

**DATE:** January 16, 2018

The Department strongly cautions against pursuing legislation that seeks to directly or indirectly effect what is expressly foreclosed by the Federal Communications Commission's ("FCC") recent net-neutrality order.<sup>1</sup> The recent order contains explicit preemption provisions that limit the states' ability to regulate internet traffic. In relevant part, the Order reads:

We therefore preempt any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order. Among other things, we thereby preempt any so-called 'economic' or 'public utility-type' regulations, including common-carriage requirement akin to those found in Title II of the [federal Telecommunications Act] and its implementing rules, as well as other rules or requirements that we repeal or refrain from imposing today because they could pose an obstacle to or place an undue burden on the provision of broadband Internet access service and conflict with the deregulatory approach we adopt today."<sup>2</sup>

<sup>1</sup> *In re Restoring Internet Freedom*, WC Docket No. 17-108, Order of January 4, 2018. (Order can be found at: [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2018/db0105/FCC-17-166A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0105/FCC-17-166A1.pdf)).

<sup>2</sup> *Id.* at ¶ 195.



The FCC found that various sections of the federal Telecommunications Act, the so-called "impossibility exception,"<sup>3</sup> and various federal court decisions all provide independent legal authority for the FCC to preempt any state or municipal laws that impose rules or requirements that would reverse the FCC's general deregulatory approach to controlling internet traffic and net-neutrality.<sup>4</sup> However, the FCC also made clear that it does not intend to preempt the states' "traditional role in generally policing such matters as fraud, taxation, and general commercial dealings."

The preemption provisions in the FCC order are quite broad and severely limit states' ability to directly or indirectly regulate internet traffic or impose state-specific net neutrality requirements. Therefore, a state legislative bill that seeks to reverse or partially countermand the FCC's ruling on net-neutrality would likely run afoul of the preemption provisions of the FCC's order, thus giving rise to very strong grounds for a challenge to the state's action in federal court. Any internet service provider, including wireless phone carriers, would be able to challenge such a law in federal court.

While the FCC is a federal administrative agency whose orders are subject to review by the federal courts, and which can be mooted by Congressional action, the federal courts in recent years have been generally deferential to FCC orders that have been challenged. While the FCC's order leaves space for states to act within their traditional spheres of regulatory jurisdiction (fraud, taxation, and commercial dealings), a federal court is likely to be highly skeptical and disinclined to uphold any law that directly or indirectly<sup>5</sup> seeks to legislate or regulate net-neutrality. The fairly recent decision from the federal Second Circuit Court of Appeals in the Vermont Yankee litigation serves as an example of how such efforts can be costly to the state with no gain.<sup>6</sup> For all of these reasons the Department strongly cautions that any sort of net-neutrality law passed by a state would almost certainly result in a costly and protracted lawsuit in federal court with slim prospects of the state prevailing.

As an alternative to state legislative action discussed above, it may be more productive for the Vermont General Assembly and the Governor to join in issuing a resolution expressing support for reversing the recent action by the FCC concerning net-neutrality.

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<sup>3</sup> Under the "impossibility exception," the FCC "may preempt state law when (1) it is impossible or impracticable to regulate the intrastate aspects of a service without affecting interstate communications and (2) the Commission determines that such regulation would interfere with federal regulatory objectives." *Id.* at ¶ 198.

<sup>4</sup> *Id.* at ¶¶ 197-204.

<sup>5</sup> Here, "indirectly" includes any state law that on its face does not appear to touch or concern the federally preempted matter, but that has the effect of encroaching on the federally preempted matter when it is applied.

<sup>6</sup> *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, at 733 F.3d 393, 421 ("We conclude that the district court carefully, fairly, and properly analyzed the legislative intent undergirding Act 160 and found that it demonstrated an impermissible primary purpose on the part of the Vermont Legislature.").