

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

**In the Matter of Docket No GN Docket No. 14-28, *Protecting and Promoting the
Open Internet***

Comment of MFRConsulting

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**Review of the Progressive Policy Institute’s (PPI) Paper:
*“Outdated Regulations Will Make Consumers Pay More for Broadband”¹***

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Introduction

This comment is a rebuttal to an extensive campaign being waged against Title II reclassification of broadband on the grounds that it would inevitably harm consumers’ interests and the development of broadband in the U.S. This campaign now incorporates the findings presented in the Progressive Policy Institute’s paper on the consequences of Title II reclassification for consumers’ costs of broadband.

The evidence and assertions presented in this negative and flawed campaign are riddled with errors of omission and commission. Moreover, they exhibit historical amnesia about events and key decisions by the Government that created the environment in which the Internet and multiple valuable innovative services have been able to flourish over the past two to three decades. These same decisions enabled the very broadband incumbents, who now inveigh against a substantive

¹ <http://www.progressivepolicy.org/slider/outdated-regulations-will-make-consumers-pay-broadband/>

role for the Government in broadband infrastructure, to grow their businesses while enjoying substantial protection from competition and benefiting from support thanks to significant subsidies paid for by their customers.

The assessment of the Progressive Policy Institute's attack, entitled "Outdated Regulations Will Make Consumers Pay More for Broadband" presented in these Comments addresses the most recent addition to the misleading and unfounded forecasts of the allegedly dire consequences of Title II reclassification. A link to this paper has been added to the National Cable and Telecommunications Association's (NCTA) lobbying against Title II.²

Summary

The findings of this PPI paper are that Title II reclassification will lead to a significant increase in consumers' costs for broadband services, e.g., between \$84-89 annually per household.

For the most part (80% or more) these alleged and asserted increases will come from assumed additional state and local taxes and fees.

These findings are disingenuous and speculative. They rely on a hypothetical scenario that is not inevitable or realistic, but is designed to scare the public and other constituencies who are concerned about Title II.

The major flaws and gaps in this one-sided analysis of consumers' costs include:

- (a) A set of assumptions that are either obscure and arbitrary, as well as impossible to evaluate, given the limited information presented in the paper, or assume an application of Title II that is only one among several possibilities;
- (b) The unjustified attribution of potential or envisioned increases in costs to Title II reclassification that are, in fact, independent of such an initiative;
- (c) Omission of the power and record of state and local authorities in setting and adjusting taxes and fees independently of a Federal Title II reclassification of broadband;
- (d) A failure to acknowledge the possibility – indeed the probability based on precedent, - that the FCC and/or Congress, e.g., the Internet Tax Freedom Act, could take additional steps to remove or limit any future taxes or fees or increases in taxes and fees that might come into force under Title II reclassification;

Furthermore, the authors completely ignore the role of the broadband incumbents in two significant and relevant aspects. The broadband operators introduce at their discretion charges that increase the costs of broadband services for their customers with the sole effect of boosting the revenues they receive from customers independently of any taxes or fees they are required to collect. Furthermore, documented evidence demonstrates that they are pursuing a "hybrid" self-serving

² <https://www.ncta.com/positions> (accessed December 4, 2014)

approach to Title II by claiming and welcoming some of its aspects, i.e., the subsidies and benefits they receive for their broadband deployments, while rejecting the obligations that accompany access to these benefits.

The PPI paper presents a confusing picture - linguistically and mathematically - of the alleged consequences (increases) for consumers' bills of a Title II reclassification of broadband. Absent access to the details of the calculations made by its authors, it is not possible to tell conclusively whether its results are valid or not, or how probable is a scenario in which they might be valid. Nevertheless, serious doubts about the veracity and probative value of this paper's conclusions are justified, even on the basis of the partial indications that are revealed about its premises and methodology. These doubts justify discarding the PPI paper in its current form as yet another unfounded addition to the scare tactics and propaganda campaign being waged by the broadband incumbents who claim that this reclassification would inevitably harm and impede the development of broadband in the U.S.

The incomplete explanations of the sources of the calculations presented in the PPI paper indicate that its findings appear to be derived from a specific set of premises that depict a hypothetical and easily avoided scenario. The theme of this scenario is, "if it's a revenue it must be taxed and subject to fees, and Title II reclassification will trigger new applications of fees and taxes to revenues that were heretofore not subject to them."

There are two convincing concrete pieces of evidence against the integrity of the PPI paper. First, its findings include potential increases in fees that are not inherently tied and are therefore improperly attributed to Title II reclassification by the FCC. Second, it fails to draw attention to the fundamental distinction between how state and Federal USF (Universal Service Fund) assessments are applied, i.e., to intrastate and interstate revenues respectively.

The Calculations are Flawed and Based on Dubious and/or Obscure Premises

The following paragraphs identify and analyze the premises and methodology employed in the PPI document to forecast the impact on consumers' costs at the state and local as well as Federal level of Title II reclassification of broadband.

Impact on State and Local Taxes and Fees

The bulk of the alleged Title II-related increases in consumers' bills reported in this paper comes from state and local fees and taxes. This conclusion raises two obvious questions: (a) Why should or would states and localities increase the total amounts of the taxes and fees they collect through these bills because the Federal Government reclassifies broadband; and (b) In any case, which ones among the diverse categories of such fees and taxes would or should be affected by Title II

reclassification³?

One example relevant to the second question is the Municipal Franchise/Right of Way Fee that consumers pay to cover the cost to network operators for their use of municipal public rights of way to provide telecommunications services. Title II reclassification does not change these costs, so there is no justification for increasing the fee for the use of public rights of way that should already be fully covered. Moreover, is there any requirement or motivation, especially but not only in states whose governing politicians loudly advocate for tax cuts, to increase a state or local tax or fee simply because of Federal Title II reclassification, and if not why would, or even if there is why would or could a State or municipality not forbear from doing so?

Moreover, Title II is designed to be flexible in its application. The FCC can forbear from extending Federal USF assessments to retail broadband access revenues, and also has the authority to preempt states from doing so⁴.

Another apparent anomaly in the authors' calculations is that for the purposes of applying Federal USF charges to broadband services they assume that all broadband revenues are interstate. Yet, for example, the state USF charges in Texas and Wisconsin are only applied to intrastate revenues. Do the authors therefore expect that broadband will be categorized as 100% interstate at the Federal level but partially intrastate at the state level? Why do they not distinguish clearly between the different applications of USF funding to interstate and intrastate revenues and hence the correspondingly different potential implications of a Federal Title II reclassification? Why do they not acknowledge that it lies in the power of state legislatures to decide which operators will be subject to a state USF assessment⁵?

³ An example of the number and diversity of taxes and fees that may be or are added to customers' bills that vary by state and in some states by locality within a state that are in almost all cases independent of broadband revenues can be found at <http://www.verizon.com/support/residential/phone/homephone/billing/charges+and+taxes/taxes+and+surcharges+on+your+bill/95873.htm>. Some but far from all states have their own USFs, but while as the authors state, "In contrast, there is no process at the state level to target a specified amount of revenue," whereas there is one for the Federal USF described later, there is nothing to stop a state from forbearing to increase state USF charges in the event of a Title II reclassification. The paper does not identify which if any state or local taxes or fees would be automatically increased by a Title II reclassification of broadband or indicate whether any changes in the amounts collected from consumers would be subject to the discretion or forbearance of a state legislature or regulator or local authority, or which taxes or fees would be by definition unaffected by such a reclassification.

⁴ Communications Act, Section 10 (e) – "STATE ENFORCEMENT AFTER COMMISSION FORBEARANCE --A State commission may not continue to apply or enforce any provision of this Act that the Commission has determined to forbear from applying under subsection (a)".

⁵An example of an on-off-on situation regarding the subjection of CMRS providers to a state USF assessment can be found at: <http://psc.wi.gov/utilityinfo/tele/assessmentFees/whatProviders.htm>; Maryland is another example of the influence of a state over the structure of and what services are liable to a state USF assessment (<http://doit.maryland.gov/mdrelay/Pages/USTF.aspx> and <http://www.opc.state.md.us/LinkClick.aspx?fileticket=H0mA6zUxxwY%3D&tabid=138>)

Therefore, the finding that “... *the average annual increase in state and local fees levied on U.S. wireline and wireless broadband subscribers will be \$67 and \$72, respectively*” should be viewed with extreme skepticism. They are not credible. They should be discarded until and unless the questions outlined above are answered, and the specific calculations employed to produce this result are described for each tax and fee, and are either validated or shown to be unreasonable.

Impact on Federal Fees

The calculation of the increase in Federal fees from Title II reclassification is just as questionable as, and more visibly flawed than, the calculation of state and local fees. First of all the increase in total annual Federal fees collected from consumers is calculated as \$2.014 billion, **including the envisioned increase by the FCC of \$1.5 billion in Universal Service Funding for the E-rate program**⁶. In other words, the net calculated increase in consumers’ costs attributable to Title II reclassification, even according to the dubious premises of this paper, is actually \$514 million, or an average of about \$4.4 per year per household.

The authors say correctly that, “... *the federal rate of 16.1 percent for the USF will adjust downward as the rate base expands.*” Therefore, the increase in USF fees that consumers will allegedly pay is based on the assumption that instead of 50% as at present, consumers will contribute 62.3 % of total USF revenues post Title II reclassification. The authors say that they ignore the taxes and fees paid by businesses. Thus in their scenario any allegedly Title II-related additional taxes and fees will only be applied to a larger share of consumers’ but not of businesses’ bills. Therefore, since no new business revenues will be covered by these newly applied taxes and fees the share of the universal service “pie” paid for by consumers will increase.

No justification or explanation is provided for burdening consumers but not businesses in this scenario. But if both categories of customer are equally burdened so the percentage contribution to the USF made by consumers remains the same then the total annual Federal fees collected from households will remain constant, although some households may pay more and others less, depending on the mix of services to which they subscribe.

An even more astonishing omission in the PPI paper is the absence of a reference to the Internet Tax Freedom Act that has nothing to do with Title II. According to this Act Internet access services are exempt from sales taxes and several other kinds of actual or potential taxation. This Act expires this month (December 2014), and is up for renewal, and even to be made permanent. As of this writing the House of Representatives has passed the new version of the Act that now goes to the Senate.

⁶ <http://thejournal.com/articles/2014/11/17/fcc-proposes-3.9-billion-for-school-technology-program.aspx>

Furthermore, the FCC has the authority to waive the requirement for providers to contribute a portion of their retail broadband revenues to the Federal USF on the grounds that the effect would be to reduce broadband adoption among poorer households, which would be inconsistent with a key goal of achieving effectively universal adoption of broadband. **In summary, there is no reason to expect that Title II reclassification of broadband would or should lead to any increase in the costs of broadband to consumers.**

Questions unanswered in the PPI paper with respect to Federal USF fees include:

(i) Is the assumed increase in the share of USF revenues contributed by households an inevitable, or pre-ordained, consequence of Title II reclassification? (ii) Is it beyond the wit of the FCC to ensure that this outcome is avoided? (iii) Why do the authors in identifying the potential for increased costs to consumers as an undesirable consequence of Title II reclassification not then indicate to the FCC, as is delineated by the precedents reported in this document, how to ensure that such cost increases do not happen?

This Paper is Misleading and Designed to Scare not to Inform

It is difficult to escape the impression that this paper is designed to characterize every potential and hypothetical adverse consequence of Title II reclassification as the inevitable outcome of such an envisioned action by the FCC. This characterization of inevitability ignores the ways in which the FCC can take steps to avoid such consequences if there is a material risk of their occurring. It also implicitly disparages the capabilities and freedom of action of every other player in state and local governments to take steps with the same goal of avoiding additional costs to consumers.

Broadband Incumbents, Title II, Consumers' Costs & Administrative Charges

The analysis in the PPI document includes no discussion of the current and potential roles of the broadband incumbents themselves in their treatment of Title II with respect to broadband, both historically and at present, and in the future, as well as their treatment of consumers and contribution to increasing consumers' costs. This treatment includes in particular the practice of adding so-called "administrative" charges at their sole discretion to consumers' bills independently of any mandated fees and taxes.

There is clear evidence (not a hypothetical scenario) that the policy of the broadband incumbents toward Title II has been, and is, one of "Rights without Obligations." Their approach is "hybrid", or arguably hypocritical. As the example of Verizon demonstrates⁷, they are happy to accept the benefits and subsidies available

⁷ See for example Verizon's application for a cable franchise in the District of Columbia, http://oct.dc.gov/information/legal_docs/Verizon_Revised_Cable_Franchise_Application.pdf where

under Title II (privileged access to consumers and rights of way) for the deployment of their broadband networks, while at the same time they complain about all the burdens they will suffer, if their broadband facilities are subject to other provisions aka obligations of the Title II regime. They protest that these burdens will inevitably be transmitted to and fall on consumers, and will result in reduced investment and fewer innovations than if they are allowed to operate without obligations.

An objective and balanced analysis of the state of broadband and the implications of Title II reclassification would point out that the broadband incumbents themselves have a practice of adding so-called “administrative charges” to their customers’ bills that are not based on any tax or fee they are obligated to collect. These charges are implicitly based on the unusual argument that not all the costs that a broadband operator incurs in delivering broadband access services to its customers are (or should be?) reflected in their retail prices. The operator therefore reserves the right to charge an additional sum over and above its advertised retail prices to cover part of these costs, and to adjust this amount at any time at its sole discretion. The charge is set and adjusted in a non-transparent manner that is hidden from consumers.

Even consumers who have signed a fixed price contract in which they might reasonably expect that the payments they will have to make, independently of any mandated taxes and fees, will remain constant during the duration of the contract may find that these payments will increase over time. The excuse that the nature of this charge and the right of broadband operators to change it unilaterally at any time is explained in the fine print in consumers’ contracts does not inspire confidence in the attitude and culture of these operators regarding their treatment of customers. To the contrary it creates the impression that they are actively striving and able to invent and exploit devious tactics to extract as much revenue as possible from their customers in an uncompetitive market without a justification that passes the smell test.

According to the broadband incumbents an increase in administrative charges does not count as a price increase, although this distinction is one without a difference as far as the money in the customer’s wallet (or smartphone) is concerned. The amounts of these “neither price, nor tax, nor mandated fee” charges range from a few tenths of to a few dollars per month, that for a large broadband operator may generate a few hundreds of millions up to on the order of a billion dollars of annual revenue⁸. It would be interesting to see a paper from the authors of the PPI paper about the costs to consumers of broadband services that analyzed the impact on them from and the justification of this business practice of the broadband incumbents.

it identifies its FiOS network (FTTP of Fiber to the Premises) network in DC as being installed **as a common carrier pursuant to Title II of the Communications Act**, and a similar classification of FiOS in New Jersey at http://www.verizon.com/idc/groups/public/documents/adacct/nj_exhibit_a.pdf

⁸ A charge of \$1 per month for 50 million customers yields \$600 million annually.

One way in which Title II reclassification of broadband could lead to an increase in consumers' costs without any recourse and with no precedent of intervention to mitigate its impact would be the exploitation by broadband incumbents themselves of this initiative as an excuse to increase their unregulated "administrative charges."

An honest assessment of the pros and cons of Title II reclassification of broadband would also acknowledge that, contrary to the basic premise advanced by the broadband incumbents and their supporters, the broadband market is not effectively competitive⁹. The broadband incumbents have not achieved their leading market positions against fierce competition from a multitude of aspirants. They are fundamentally unlike today's Web giants that not so long ago were small startups, nor are they comparable to the most successful players in other truly competitive market sectors. Federal, State and local governments have over the years awarded the broadband incumbents privileged access in a variety of geographic jurisdictions (state-wide, municipal, various spectrum license areas) to the exploitation of scarce public resources, such as rights of way and spectrum, as well as the right to distribute online content to consumers. As a result the broadband incumbents have enjoyed substantial protection from competition. This protection came with obligations to serve the public interest.

Yet today the intent of this deal or social contract is being lost or submerged under a tsunami of self-serving disingenuous propaganda emanating from the broadband incumbents and their supporters. The balance between rights and obligations inherent in the stewardship of scarce public resources is severely out of kilter in the pronouncements of the broadband incumbents. The positions they advocate are increasingly irreconcilable with the precepts of a social contract and the goals of the Communications Act that have delivered immense value to the U.S. economy and society over the past 80 years.

The Validity of the PPI Paper

The tone in the first sentence of the PPI paper confirms its place as a contribution to the one-sided and misleading story as well as historical amnesia about their origins and development that are being presented by the broadband incumbents– *"Self-styled consumer advocates are pressuring federal regulators to "reclassify" access to the Internet as a public utility."* This sentence is disingenuous in three respects. First, the issue at stake is the openness, or not, of access to, and use of, broadband infrastructure, that includes but is not limited to access to the public Internet. Second, the adjective "self-styled" is an unworthy denigration of well-known organizations that are widely recognized for their advocacy on behalf of consumers in many arenas. This reference to advocacy on behalf of consumers also ignores the millions of actual consumers who have weighed in on the imperfectly labeled issue

⁹ <http://apps.fcc.gov/ecfs/document/view?id=60000871444>;
<http://apps.fcc.gov/ecfs/document/view?id=60000871445>

of “Net Neutrality” in the FCC’s Open Internet Proceeding. They have expressed justified concern and alarm, based on their specific real and not hypothetical experiences, about the behavior and the ways in which the broadband incumbents are treating them. They are living and breathing, not “self-styled” consumers. Third, the use of the phrase “*public utility*” is designed to foster unfounded expectations of much more severe regulation, e.g., retail price setting, than is envisioned in the case of broadband.

The PPI paper presents an unreasonably biased, misleading, and confusing forecast of the consequences of Title II reclassification of broadband. The bases of its findings are dubious and unclear. It conspicuously omits to offer any constructive proposals and attributes all consequences of this initiative to the actions of the FCC as if every other actor has no influence or power. It takes no account of the actions and potential actions (positive and/or negative) of other key stakeholders including the broadband incumbents as well as State and local governments and Congress in achieving or impeding the goal of universal and affordable access to high quality broadband infrastructure.

It is therefore unfortunate that since its publication the PPI document has also been used in a letter sent to the Federal Trade Commission (FTC)¹⁰ and signed by 32 professors and scholars of law, business, economics, and public policy, including its authors, in an effort to persuade the FTC to caution the FCC against adopting *per se* restrictions on paid prioritization and opposing the reclassification of broadband under a Title II regime.

The contents of this PPI document are beginning to play a substantial role in the opposition to Title II reclassification that is being led by the broadband incumbents. Evidence that its findings are deeply flawed and misleading are therefore correspondingly important in, and relevant to, the assessment of whether this reclassification is justified and what it would entail for the public interest and the future of broadband in the U.S.

The PPI document “*Outdated Regulations Will Make Consumers Pay More for Broadband*” is built on unrealistic premises and flawed analyses. It delivers findings that scare without justification, confuse and mislead. This document is not informative or accurate, nor does it make a constructive and creative contribution to an important debate.

¹⁰ http://laweconcenter.org/images/articles/icle_ftc_nn_letter_final.pdf