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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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Federal Communications Commission
Office of Secretary

In the Matter of the Petition of)
The United Power Line Council)
For a Declaratory Ruling Regarding the)
Classification of Broadband Over Power)
Line Internet Access Service As)
An Information Service)
_____)

RM No.: _____

PETITION FOR DECLARATORY RULING

United Telecom Council

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SUMMARY

The United Power Line Council petitions the Commission to issue a declaratory ruling that classifies BPL-enabled Internet access service as an information service. This would be consistent with the Commission's previous classification of cable modem and DSL services as information services. It would also promote broadband access and competition by BPL by providing regulatory clarity, which is important for the commercial deployment of BPL. Finally, the Commission can make this declaratory ruling based on the existing record in several proceedings.

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PETITION FOR DECLARATORY RULING

I. INTRODUCTION

The United Power Line Council (“UPLC”) respectfully requests the Commission to issue a declaratory ruling that Broadband over Power Line (BPL)-enabled Internet access service (“BPL”) is an information service as defined in the Communications Act of 1934, as amended (the “Act”).¹ The requested ruling² is requested to remove any uncertainty about the classification of BPL-enabled Internet access services and whether it will be subject to regulation under Title I or Title II of the Act.

¹ 47 U.S.C. § 153(20)(defining an information service as the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.)

² See 47 C.F.R. § 1.2 (establishing the Commission’s authority to issue declaratory rulings).

The UPLC is an alliance of utilities and their technology and service provider partners to develop BPL solutions in North America. Its members include virtually every utility and technology company that is actively engaged in the development of BPL in the country. Many of these members have deployed BPL systems in various trials to determine its technical and economic viability. Some have deployed BPL on a commercial basis. These trials and commercial deployments have yielded encouraging results, and the UPLC is optimistic about the future of BPL.

BPL, although closely watched and widely reported on, is a nascent industry based on emerging and new technology which continues to develop. BPL has been identified as a competitor to more mature broadband Internet access technologies, for example, cable modem service and Digital Subscriber Lines (“DSL”). Both cable modem service and DSL now enjoy regulatory certainty and regulatory parity as a result of each being classified as interstate information services subject to regulation under Title I.³ However, the Commission’s decisions clarifying the regulatory status of cable modem and DSL-enabled Internet access were limited to those respective technologies. The Commission’s provision of the requested declaratory ruling would help provide the same level of regulatory clarity to the nascent BPL industry as well, thereby assuring regulatory neutrality among the competing technologies.

³ *Notice of Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, GN Docket No. 00-185, 17 FCC Rcd. 4798 (2002) (“*Cable Modem Declaratory Ruling*”), *aff’d National Cable Telecomms. Assn. v. Brand X Internet Svcs.*, 125 S. Ct. 2688 (2005); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, CC Docket No. 02-33, 2005 WL 2347773 (“*DSL Order*”)

II. BPL IS LIKE OTHER BROADBAND SERVICES THAT ARE CLASSIFIED AS INFORMATION SERVICES.

The Commission is moving away from legacy regulation of broadband services and towards a “comprehensive policy” that regulates “like services in a similar manner.”⁴ Consistent with this comprehensive policy, the UPLC urges the Commission to classify BPL-enabled broadband service as an interstate information service because it shares all the relevant similarities with other broadband services, including cable modem and DSL, which the Commission has classified as interstate information services. BPL-enabled broadband service is an integrated finished service that combines computer processing with transport capabilities, like cable modem and DSL services. BPL is also an interstate service, in the sense that the traffic is routed over the Internet, like cable modem and DSL services.

In classifying cable modem and DSL service as information services, the Commission found that each was a functionally integrated finished service that inextricably intertwines information-processing capabilities with data transmission such that the consumer always uses them as a unitary service.⁵ The FCC explained that DSL and cable modem services enable users to run a variety of applications that fit under the

⁴ *DSL Order* at ¶45.

⁵ *See DSL Order* at ¶9 (concluding that DSL is an information service in that it enables an end user to retrieve files from the World Wide Web and to interact with information stored on the service provider's facilities.) *See also Cable Modem Declaratory Ruling* at ¶38 (concluding that cable modem is an information service in that it is an offering of Internet access service, which combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications.)

characteristics stated in the statutory definition of information services.⁶ Furthermore it explained that the integration of these functions into a finished service distinguishes DSL and cable modem services from other wireline broadband services that carriers and end users have traditionally used for basic transmission services.⁷ Thus the Commission has classified DSL and cable modem services as information services, and the Commission specifically stated that it would address the regulatory treatment and other issues associated with alternative broadband platforms, such as BPL “in a manner not inconsistent with the analysis and conclusions in [the DSL] Order.”⁸

Applying the same analysis to BPL, the UPLC submits that BPL is like cable modem and DSL services in that it combines computer processing and transmission capabilities into a functionally integrated and interactive information service. BPL provides high-speed Internet access, and a host of applications, including email, web-surfing, etc. that provide the “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”⁹ BPL inextricably intertwines information processing and data

⁶ See *DSL Order* at ¶9. See also *Cable Modem Declaratory Ruling* at ¶38 (listing e-mail, newsgroups, maintenance of the user's World Wide Web presence, and the DNS as functions supported by cable modem service that are information services.)

⁷ See *DSL Order* at ¶9 (listing stand-alone ATM service, frame relay, gigabit Ethernet service, and other high-capacity special access services as examples of other wireline broadband services that are not information services.) See also *Cable Modem Declaratory Ruling* at ¶40 (explaining that cable modem services provides information services via telecommunications, and distinguishing cable modem services from stand-alone offerings of transmission capability).

⁸ See *DSL Order* at n. 30.

⁹ See 47 U.S.C. Section 153(20) (defining information service as the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making information available via telecommunications, and includes electronic publishing, but does not include any use of any such capability

transmission into a seamless service offering. Consumers access information over the Internet from any point anywhere in the world, using the electrical distribution grid and in-premises wiring. As such, BPL is an information service that is jurisdictionally interstate, like cable modem and DSL.¹⁰

BPL systems also share technical similarities with DSL and cable modem. BPL works by amplifying a digital signal over the electrical current on the power lines, in much the same way that DSL works by amplifying a digital signal over the voice signal on telephone lines. Like cable modem, BPL is a shared medium. That is the capacity on BPL is shared between subscribers. Therefore, even though BPL uses different infrastructure, it shares certain inherent technical similarities with cable modem and DSL. These inherent technical similarities further support the basis for treating these like services in a similar manner. Therefore, the UPLC submits that BPL should be classified as an interstate information service.

III. CLASSIFYING BPL AS AN INFORMATION SERVICE WOULD SERVE THE PUBLIC INTEREST.

The policy reasons underlying the decisions to classify DSL and cable modem as information services apply as much if not more so to BPL. Classifying BPL as an information service will remove any regulatory uncertainty which could discourage investment in and deployment of BPL systems. The deployment of BPL would promote

for the management, control, or operation of a telecommunications system or the management of a telecommunications service.)

¹⁰ Compare *Cable Modem Declaratory Ruling* at ¶59 (Having concluded that cable modem service is an information service, we clarify that it is an interstate information service. The Commission has found that “traffic bound for information service providers (including Internet access traffic) often has an interstate component.”)

facilities-based competition in the broadband market, which is currently dominated by cable modem and DSL. It would also promote broadband access to all Americans, consistent with the mandate of Section 706 of the Communications Act. BPL would promote homeland security by providing redundant networks that promote communications reliability. Finally, BPL would promote the public interest in other ways that cable modem and DSL can't – by improving the efficiency, security and reliability of the delivery of electrical service to the public at large.

According to the latest statistics from the FCC, ninety-two percent of all advanced services lines are DSL and cable modem, and the vast majority of the country is only served by fewer than three providers of high-speed services (i.e. not even broadband).¹¹ Between the two, cable modem has over three times as many advanced services lines as DSL. The relatively small competition there is from DSL is dominated by ILECs generally, and RBOCs specifically. Ninety-five percent of all DSL lines are provided by ILECs, and eighty-three percent are provided by an RBOC. Overall, these statistics continue to point out the need for a third major facilities-based broadband service to compete with cable modem and DSL.

The Commission has recognized that competition drives down price and promotes innovation, and that BPL is an intermodal competitor to cable modem and DSL.¹² In

¹¹ See High-Speed Services for Internet Access: Status As of December 31, 2004 at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd0705.pdf, visited November 16, 2005. Considering that the Commission's statistics count satellite towards one of those three providers and a zip code is considered "served" if there is just one subscriber in the zip code, the level of competition may be significantly less than even the statistics indicate.

¹² "Intermodal competitors" are providers of services similar to those provided by incumbent LECs that rely exclusively on technological platforms other than wireline technologies. As we discuss [] below, intermodal competitors include, for example, cable modem service providers, wireless broadband Internet access service providers, satellite broadband Internet access service providers, and other broadband Internet

areas where BPL has been deployed consumers have seen both effects first hand. In Manassas, Virginia for example the incumbent cable modem provider reduced its price 55% after the city began offering BPL.¹³ Other BPL deployments have seen similar responses from competing broadband providers. BPL also offers innovative features such as synchronous speeds, home networking, plug and play convenience, and low latency that enhance the customer experience. In areas where BPL has been deployed, customer satisfaction ratings have been high. In fact, half of the BPL customers served in Cincinnati switched from cable modem or DSL, and other BPL deployments have seen upwards of 30% take rates.¹⁴ All of this confirms that there is pent up demand for broadband that is affordable and innovative, and BPL is both.

There is an additional inherent advantage to BPL; by using the electric distribution system as communications medium, it enables utilities to better monitor and control their electric delivery systems and provide better electric service to their customers. BPL can detect faults on the network before they become outages, enabling utilities to improve reliability. BPL also provides two-way real-time connectivity, enabling advanced metering applications and remote management of the distribution grid. Utilities are also using BPL to provide video surveillance of electrical substations and traffic. Not only do these utility applications have enormous potential for homeland

access service providers such as broadband over power line providers. *DSL Order* at n. 7, *emphasis added, citations omitted*. See also, *DSL Order* at ¶ 33, n. 97.

¹³ *Broadband over Power Line (BPL) Could Hit \$4.5 Billion Revenue*, Communications Daily, Feb. 25, 2005.

¹⁴ Tim Kridel, *Pipedream*, Telephony, June 6, 2005 ("More than 50% switched from cable modem or DSL," says Kathy Meinke, a spokesperson for Cinergy, whose BPL systems currently pass about 50,000 homes in metro Cincinnati. "More than 40% have switched from dial-up."); See also Linda Haugsted, *Utilities Ready to Zap Broadband Ops*, Multichannel News, Mar. 21, 2005; And see *Adoption of BPL by still wary IOUs remains slow, but adherents see gains coming soon*, Electric Utility Week, Sept. 20, 2004 (quoting 25-30% predicted penetration rates in Manassas and Nelson County, Virginia).

security and public safety, they also pay dividends for energy efficiency and environmental protection.

By using the existing electric distribution infrastructure and by leveraging the benefits of its utility applications, BPL can be deployed quickly and cost-effectively in rural isolated communities as well as densely settled suburban and urban markets. Wherever there is power, there can be broadband. That makes BPL an enabling technology to do different things with broadband. It can reach places that other technologies can't and it provides flexibility that others don't. Fundamentally though, it promotes affordable broadband access for all Americans, which is a central public policy goal. Utilities are already providing BPL in many areas where there is no other broadband service at all, and some are offering service for less than \$30.¹⁵ Compared with other wireline broadband technologies, deploying BPL avoids the truck rolls and trenching that have delayed broadband deployment, driven up costs and torn up streets. Thus, BPL can and already does make a difference to the digital divide. For all these reasons, classifying BPL as an information service would demonstrably serve the public interest by providing regulatory certainty, which would encourage investment and stimulate deployment of BPL systems.

¹⁵ Linda Haugsted, *Utilities Ready to Zap Broadband Ops.*, Multichannel News, Mar. 21, 2005 ("Manassas residential consumers pay \$28.95 per month for the service; the commercial rate is \$39.95. Throughput speeds may range from 500 Kbps to 10 Mbps, he said, depending on how many users log on. Users are guaranteed a minimum speed.")

IV. THE FCC CAN MAKE THE DECLARATION BASED ON THE EXISTING RECORD BEFORE IT.

The Commission may issue a declaratory ruling to remove uncertainty, particularly where important matters of public policy are affected, as is the case here.¹⁶ While the Commission has classified cable modem and DSL as information services, it has deferred from doing so for other wireline broadband Internet services, including BPL.¹⁷ A declaratory ruling that BPL is an information service would remove any regulatory uncertainty and would provide regulatory parity with cable modem and DSL, consistent with the Commission's comprehensive policy towards broadband generally.¹⁸

The timing of the declaratory ruling is important. BPL is already rolling out commercially and could face conflicting and complex regulatory requirements. As noted above, providing regulatory certainty will also encourage utilities to deploy BPL, which would advance competition and access in the broadband market. A declaratory ruling would provide immediate clarity, which is important as BPL is offered commercially, and as it is more widely deployed in general.

¹⁶ See 47 C.F.R. §1.2.

¹⁷The reason the Commission deferred from classifying BPL appears largely procedural, because the Commission had expressly decided not to address the regulatory classification of other wireline broadband Internet access platforms when it initiated the rulemaking. See *DSL Order* at ¶11, n. 30 (deferring from addressing the regulatory classification of BPL). See also *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Notice of Proposed Rulemaking, CC Docket No. 02-33, 17 FCC Rcd. 3019 at n. 1 (this proceeding does not address classification issues of broadband Internet access services provided over traditional or new cable, wireless, (satellite, mobile, or fixed wireless), power line (electric grid), or all-fiber networks that do not have any roots in traditional telephone networks).

¹⁸ See *DSL Order* at ¶45, *supra* n. 4

The Commission has compiled an extensive record about BPL specifically, and broadband generally, upon which it could issue a declaratory ruling that BPL is an information service. The record in the BPL Inquiry and the BPL Rulemaking addressed the services provided over BPL systems, even though the focus was on technical rules for BPL operations.¹⁹ In addition, the record in the DSL proceeding addressed BPL as an intermodal competitor, and comments by four RBOCs and one equipment vendor considered BPL as an emerging broadband Internet access competitive platform, as well.²⁰ The Commission may also refer to the record from the *Fourth Section 706 Report* and the *High-Speed Services July 2005 Report*, which includes data on BPL.²¹ More recently, Comcast provided comments to the Commission in Docket MB 05-255 *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, outlining Comcast's belief that BPL, although nascent, has the potential to provide additional video distribution competition.²² These proceedings provide sufficient information upon which the Commission could issue a declaratory ruling that BPL is an information service.

It would be appropriate for the Commission to issue a declaratory ruling that BPL is classified as an information service based on the existing record.²³ The Commission

¹⁹ See *Inquiry Regarding Carrier Current Systems, including Broadband Over Power Line Systems*, Notice of Inquiry, ET Docket No. 03-104, 18 FCC Rcd. 8498 (2003) ("BPL Inquiry"). See also *Carrier Current Systems, including Broadband over Power Line Systems and Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband over Power Line Systems*, Notice of Proposed Rulemaking, ET Docket Nos. 03-104 and 04-37, 19 FCC Rcd 3335 (2004) ("BPL Rulemaking").

²⁰ BellSouth, Qwest, SBC, Verizon and Alcatel. See *DSL Order* footnote 7.

²¹ See *DSL Order*. n.7 and 97.

²² Comments of Comcast in MB Docket No. 05-255 at 40-42 (filed Sept. 19, 2005).

²³ It would be appropriate to issue the declaratory ruling immediately because of the importance of BPL to promoting access and competition in the broadband market, the need to remove regulatory uncertainty

does have broad discretion to determine how it should proceed in such matters, and it has issued declaratory rulings under similar circumstances.²⁴ For example, the Commission issued a declaratory ruling to settle the controversy over intercarrier compensation for ISP-bound traffic.²⁵ Of course, the Commission also issued a declaratory ruling to classify cable modem as an information service.²⁶ In these matters, the Commission needed to intervene decisively on issues of importance to broader policies. Decisive action is necessary and appropriate to declare BPL as an information service, consistent with Commission precedent.

V. CONCLUSION

In light of the *Cable Modem Declaratory Ruling*; the United States Supreme Court *Brand X* decision upholding that order; the *DSL Order*, information about BPL present in the record associated with the *DSL Order* and other dockets; and the Commission's comprehensive broadband policy; the Commission should declare that BPL-enabled Internet access service is an information service in the same manner as cable modem service and DSL.

Electric utilities, BPL technology vendors, service providers (and consumers) seeking access via BPL, and potential investors in BPL endeavors, lack the regulatory

concerning its regulatory classification as it is rolled out commercially, and the extensive record developed already concerning BPL and the regulatory classification of broadband services.

²⁴ See *SEC v. Chenery*, 332 U.S. 194 (1947).

²⁵ *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, Order on Remand and Report and Order, CC Docket No. 96-98, 16 FCC Rcd 9151 (2001). See also *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, Order, WC Docket No. 02-361, 19 FCC Rcd. 7457 (2004) (finding that AT&T's phone-to-phone IP telephony services are telecommunications services that are subject to access charges).

²⁶ *Cable Modem Declaratory Ruling*, *supra* n. 3.

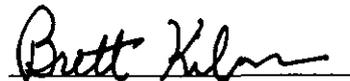
certainty associated with cable modem service and DSL. This lack of certainty is an impediment to the growth of BPL and attainment of the Commission's goals for the availability of broadband Internet access to all Americans. The Commission should move expeditiously to grant this petition for declaratory ruling for the reasons stated herein.

WHEREFORE, THE PREMISES CONSIDERED, the UPLC respectfully requests that the FCC declare that BPL-enabled Internet access service is an interstate information service, consistent with the *Cable Modem Declaratory Ruling* and the *DSL Order*.

Respectfully submitted,

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