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

In the Matter of	)	
	)	
Consumer Protection in the Broadband Era	)	WC Docket No. 05-271
	)	
	)	

COMMENTS OF THE
NEW JERSEY DIVISION OF THE RATEPAYER ADVOCATE

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On the Comments:

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I. INTRODUCTION

As part of a larger effort to address the maturing broadband industry, the Federal Communications Commission ("FCC" or "Commission") issued a *Report and Order and Notice of Proposed Rulemaking* ("NPRM") on September 23, 2005.[1] In the *NPRM*, the Commission acknowledges the growing importance of broadband Internet access to consumers. Through the *NPRM*, the Commission seeks to "to develop a framework for consumer protection in the broadband age – a framework that ensures that consumer protection needs are met by all providers of broadband Internet access service, regardless of the

[1]/ *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33; *Universal Service Obligations of Broadband Providers, Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337; *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirement*, CC Docket Nos. 95-20, 98-10; *Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises*, WC Docket No. 04-242; *Consumer Protection in the Broadband Era, WC Docket No. 05-271, Report and Order and Notice of Proposed Rulemaking*, rel. September 23, 2005 ("*NPRM*").

underlying technology."[2] The Commission finds justification to act in relation to broadband access in its Title I ancillary jurisdiction.[3] The New Jersey Division of the Ratepayer Advocate ("Ratepayer Advocate") welcomes the opportunity to submit these comments in response to the *NPRM*.

A. INTEREST OF THE RATEPAYER ADVOCATE IN THE INSTANT PROCEEDING.

The Ratepayer Advocate is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. The Ratepayer Advocate participates actively in relevant Federal and state administrative and judicial proceedings. The above captioned proceeding is germane to the Ratepayer Advocate's continued participation and interest in implementation of the Telecommunications Act of 1996.[4] The New Jersey Legislature has declared that it is the policy of the State to provide diversity in the supply of telecommunications services, and it has found that competition will "promote efficiency, reduce regulatory delay, and foster productivity and innovation" and will "produce a wider selection of services at competitive market-based prices."[5] Consumer protection is of great importance to the Ratepayer Advocate as is the objective of ensuring that all consumers have affordable access to broadband technology. Furthermore, the

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[2] / *NPRM*, at para. 146.

[3] / Title I of the *Telecommunications Act of 1996*. The Commission also referenced its Title I jurisdiction in the "*VoIP E911 Order," In the Matters of IP-Enabled Services,* WC Docket No. 04-36; *E911 Requirements for IP-Enabled Service Providers,* WC Docket No. 05-196, *first Report and Order and Notice of Proposed Rulemaking,* Rel. June 3, 2005.

[4]/ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as "the 1996 Act," or "the Act," and all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code.

[5]/ *N.J.S.A.* 48:2-21.16(a)(4) and 48:2-21.16(b)(1) and (3).

Ratepayer Advocate is encouraged that "consumer protection remains a priority for the Commission."[6]

B. SCOPE OF THE *NPRM*

The Commission requests comment about several consumer protection issues related to broadband access: protection of consumer information, slamming, truth-in-billing, network outage reporting, discontinuance of service, rate averaging, and jurisdiction of federal and state authorities. In addition, the *NPRM* solicits input on several general questions relating to consumer protection such as: Is regulation of broadband Internet access providers desirable and necessary, or will market forces provide the necessary consumer protection? Are the above issues more or less relevant for broadband Internet access than for traditional telephony? Are there technical, economic, or other impediments that may prevent broadband service providers from complying with regulations that might be enacted for consumer protection? Are there additional consumer protection issues not addressed in this *NPRM* which the Commission should address?[7] In these initial comments, the Ratepayer Advocate provides its preliminary response to these and related issues.

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[6] / *NPRM*, para. 146.

[7] / *NPRM*, para. 147.

C. SUMMARY

General questions concerning broadband deployment and consumer protection

Before addressing the specific aspects of consumer protection that the Commission identifies, the Ratepayer Advocate will address briefly the Commission's general questions:[8]

Is regulation of broadband Internet access providers desirable and necessary, or will market forces provide the necessary consumer protection?

The regulation of broadband Internet access providers is necessary to ensure that the deployment of new technology does not erode the framework of consumer protection policies and rules that the Commission and state regulators have spent years to design and enforce. Existing market forces are insufficient to ensure that the market works efficiently and that consumers are adequately protected. Broadband access is based on a duopoly that is emerging consisting of cable companies and telephone companies. A duopoly, which is an extreme form of an oligopoly, is only one step away from a monopoly. In an oligopoly, a number of firms compete in a market, and the firms' behavior, cost functions, and strategic interaction as well as consumers' demand functions affect the market structure.[9] One textbook describes the behavior of firms in an oligopoly as follows:

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[8] / *NPRM*, at para. 147. The Ratepayer Advocate recognizes that the Commission also seeks comments on these questions as they pertain specifically to each of the issues.

[9]/ Mas-Colell, Andreu, Michael D. Whinston and Jerry R. Green, *Microeconomic Theory* (New York: Oxford University Press, 1995), at 387 through 427; F. M. Scherer, *Industrial Market Structure and Economic Performance*, Rand McNally & Company, (1970), at 131 through 157.

> Any realistic theory of oligopoly must take as a point of departure the fact that when market concentration is high, the pricing decisions of sellers are interdependent, and the firms involved can scarcely avoid recognizing their mutual interdependence. If they are at all perceptive, the managers of oligopolistic firms will recognize too that profits will be higher when cooperative policies are pursued than when each firm looks only after its own narrow self-interest. As a result, we should expect oligopolistic industries to exhibit a tendency toward the maximization of collective profits, approximating the pricing behavior associated with pure monopoly.[10]

Are the issues that the Commission identifies in the NPRM more or less relevant for broadband Internet access than they are for traditional telephony? [11]

Consumer privacy, protection against slamming, truth-in-billing, network outage reporting, limitations on a carrier's ability to discontinue service unilaterally to consumers, rate averaging, and states' active role in consumer protection are equally relevant to broadband Internet access as they are to traditional telephony. As the nation migrates to a more advanced telecommunications platform, consumer protection goals are as important as they are and have been in the world of plain old telephone service ("POTS"), although the Ratepayer Advocate recognizes that, in some areas, such as slamming, the risks may not be as great simply because it may be impossible, based on equipment requirements, for a consumer to be slammed by a broadband supplier.

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[10]/ F. M. Scherer, *Industrial Market Structure and Economic Performance*, Rand McNally & Company, (1970), at 157.

[11] / *NPRM*, para. 147.

Are there technical, economic, or other impediments that may prevent broadband service providers from complying with regulations that might be enacted for consumer protection? [12]

The Ratepayer Advocate recommends that the Commission clearly state that broadband service providers bear the burden of proof regarding any purported inability to comply with consumer protection rules. The Commission should assume further that unless such a proof has been made, broadband service providers should be expected to comply with consumer protection rules.

Are there additional consumer protection issues not addressed in this NPRM which the Commission should address?[13]

In these comments, the Ratepayer Advocate addresses concerns about the growing digital divide in the United States, and urges the Commission to take steps to remedy this serious weakness in the nation's communications infrastructure.

Principles to guide consumer protection in the broadband era

The following principles should guide the Commission's analysis of broadband and consumer protection:

- *Ensure and recognize states' role in consumer protection and broadband regulation*: Congress gave no expressed directive to the FCC regarding exclusive jurisdiction over broadband including preempting states in regulating broadband. Any attempt to limit state jurisdiction interferes with state authority and implicates the role of the state and federal government under our Constitutional form of Government. The Ratepayer Advocate submits that there is concurrent

[12] / *NPRM*, para. 147.

[13] / *NPRM*, para. 147.

jurisdiction over broadband. Although Section 706 of the Act encourages deployment of advanced services, nothing in this section grants the FCC the right to exclusive jurisdiction or evidence an expressed intent to preempt state authority. In regard to consumer protection, states are in the best position to protect consumers and therefore, although the Ratepayer Advocate supports federal-state cooperation, states should be afforded substantial latitude in setting and enforcing consumer protection rules and regulations.

- *Ensure consumer protection in the face of rapid technological change:* Hard-fought-for consumer protection should not be sacrificed in the name of technological innovation and advancement. As demand for broadband increases, and broadband evolves into a more ubiquitous mode of communication platform (and in the pursuit of such ubiquity), the FCC
- should not relinquish the consumer protection that has evolved for traditional telephone service. Figures 1 through 4, included at the end of these comments, illustrate consumers' increasing demand for broadband services. By way of contrast, Figure 5 shows the pattern of growth in demand for basic telephone service between 1920 and 2000.
- *Prevent undue price discrimination:* The two-tiered system that Verizon and other ILECs propose with premium prices for premium access to the Internet should be rejected.
- *Provide Lifeline support for broadband services:* The existing universal service program likely requires expansion to promote broadband deployment to all households. Absent such regulatory intervention, the United States may become a two-tiered society of disparate access to and use of broadband. The Ratepayer Advocate concurs with Chairman Martin's observation that "[b]roadband deployment is vitally important to our nation as new, advanced

services hold the promise of unprecedented business, educational, and healthcare opportunities for all Americans."[14] The Ratepayer Advocate also concurs with Commissioner Adelstein's comment that "[w]e have a bt more work to do to establish a coherent national broadband policy that signifies the level of commitment we need as a nation to speed the deployment of affordable broadband services to all Americans." [15]

Finally, in light of the rapidly growing demand for broadband services, the Ratepayer Advocate urges the Commission to bolster consumer protection rules and policies expeditiously. But, state commissions have concurrent jurisdiction to regulate broadband, including consumer protection at the state level.

II. ANALYSIS OF ISSUES

The Commission should prohibit broadband Internet access providers from disclosing information about customers without prior customer approval.

The Commission appropriately recognizes that protecting consumers' privacy is important whether one is communicating via broadband Internet access or through conventional telecommunications services.[16] The Commission states that Section 222 of the Act governs the use and disclosure of customer proprietary network information ("CPNI") by traditional telecommunications services. The Commission asks if privacy requirements similar to the Act's CPNI requirements should apply to broadband services:

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[14] / *NPRM*, Statement of Chairman Kevin J. Martin, at 123.

[15] / *NPRM*, Statement of Commissioner Jonathan S. Adelstein, at 131.

[16] / *NPRM*, at para. 148.

> For example, should we adopt rules under our Title I authority that forbid broadband Internet access providers from disclosing, without their customers' approval, information about their customers that they learn through the provision of their broadband Internet access service?[17]

The Ratepayer Advocate urges the Commission to protect consumers' privacy, regardless of the technology deployed. Protecting customers' personal information should be a priority for the Commission. With increasing frequency, there are reports of identity theft, or simply the mismanagement of personal information. According to a study conducted by the Gartner Group, seven million Americans were victims of identity theft in the twelve months ending June 2003.[18] Another recent study, conducted by the Identity Theft Resource Center,[19] found that the impact of identity theft on consumers is huge. The study found that the average amount of time victims spent recovering their identities was 330 hours.[20] Of the identity theft victims surveyed for the study, 85% reported that it took more than six months to re-establish control over their identity and accounts.[21] Although the average out-of-pocket expenses spent in recovery efforts was $851, some victims were required to spend more than $25,000.[22] The study also found that losses to

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[17]/ *NPRM*, at para. 149. The Commission also seeks information on the types of customer information broadband providers possess as a matter of normal business operations (*e.g*., service plans, installed equipment, patterns of Internet usage).

[18] / "Gartner Says Identity Theft Is Up Nearly 80 Percent," Press Release, Gartner, Inc., July 21, 2003.

[19] / "Identity Theft: *The Aftermath* 2004," Identity Theft Resource Center, September 2005.

[20]/ *Id*., at Table 10.

[21] / *Id*., at Table 11.

[22] / *Id*., at Table 10.

business averaged $49,254 per victim in 2004.[23] The Commission should require providers of broadband Internet access to adopt appropriate safeguards for protecting customers' personal information. The FCC's authority under Title I and the assertion by the FCC of such authority does not preclude states from regulating broadband, including consumer protection.

The prohibition against slamming should apply to broadband providers.

Section 258 of the Act prevents telecommunications carriers from slamming.[24] The Commission seeks comment on whether such a policy is necessary for providers of broadband Internet access, and, furthermore, whether slamming is even possible for broadband providers:

> Typically, in order to subscribe to broadband Internet access service, a consumer must install, or have installed, equipment (*i.e.*, a modem that the ISP [information service provider] provides to the consumer and that is specific to that ISP) that, along with a proprietary password, enables the consumer to utilize that particular ISP's Internet access service. We therefore seek comment on whether, given the manner in which broadband Internet access service is provisioned, slamming could actually occur from a technical perspective.[25]

For traditional telecommunications services, slamming enforcement obligations are delegated to the states, although consumers in states that do not enforce the prohibition against slamming can file complaints with the Commission.[26] The Commission asks who should have the responsibility of enforcing a prohibition on slamming in the broadband arena. The Ratepayer Advocate recommends that the Commission adopt parallel policies for broadband service providers, and similarly delegate enforcement to the states.

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[23] / *Id*., at page 10.

[24] / *NPRM*, at para. 150, citing 47 U.S.C. § 258(a).

[25] / *NPRM* footnote 453.

[26] / *NPRM*, at para. 150.

Furthermore, the Commission should not preempt any states that establish anti-slamming regulations.

Truth-in-Billing

Truth-in-billing rules for telecommunications carriers consist of several requirements:

> [A] telecommunication carrier's bill must: (1) be accompanied by a brief, clear, non-misleading, plain language description of the service or services rendered; (2) identify the service provider associated with each charge; (3) clearly and conspicuously identify any change in service provider; (4) identify those charges for which failure to pay will not result in disconnection of basic local service; and (5) provide a toll-free number for consumers to inquire or dispute any charges.[27]

The Commission seeks comment on whether it should institute similar rules for broadband in the effort to reduce slamming, cramming, and fraud. The Commission notes further that there is a record of incorrect billing for broadband services:

> [T]he Commission's Consumer and Governmental Affairs Bureau has received complaints about the billing practices of broadband Internet access services providers, including complaints related to double billing, billing for unexplained charges, and billing for cancelled services. [28]

Truth-in-billing is essential for the market place to work efficiently. Consumers require adequate and clear billing information so that they can may make efficient economic decisions. Imposing a rule for broadband access providers similar to that created for telecommunications providers will protect the consumer and facilitate efficient purchasing transactions. States are in the best position to enforce rules, and should be provided latitude to establish more comprehensive rules as needed. Furthermore, the FCC should not preempt any states that seek to establish truth-in-billing rules.

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[27] / *NPRM*, at para. 152.

[28]/ *NPRM*, at para. 153.

Network Outage Reporting

The Commission asks if current network outage reporting requirements should apply to broadband providers and whether reporting requirements should vary by type of facility or type of customer. The Commission states that current regulations require:

> certain communications providers to notify the Commission of outages of thirty or more minutes that affect a substantial number of customers or involve major airports, major military installations, key government facilities, nuclear power plants, or 911 facilities.[29]

The Ratepayer Advocate urges the Commission to move ahead in requiring notification of network outages for broadband Internet access providers. If broadband is to become truly ubiquitous, and if all Americans are to benefit from access to the "Information Superhighway," then consumers need to be able to depend on their access providers. Adequate customer notification about network outage requirements will increase the incentive for broadband access providers to maintain their networks with proper diligence. Furthermore, comprehensive, provider-specific data, similar to the service quality data that carriers presently submit to the Commission and to state public utility commissions, will enable state and federal regulators to detect any problem areas and for consumers to make informed purchasing decisions.

Broadband providers should offer ample notification of any intention to discontinue service

Section 214 of the Act governs the procedures that a telecommunications provider must follow in order to discontinue service to customers, and requires that the service provider request permission from the Commission to "discontinue, reduce, or impair" service. [30] The Commission asks if it is appropriate to

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[29] / *NPRM*, at para. 154.

[30]/ *NPRM*, at para. 155.

create a similar procedure for providers of broadband Internet access. The Commission recognizes that customers depend more and more on availability of broadband service, so a service disruption is increasing harmful. The Commission seeks comment on whether there are enough broadband service providers to mitigate the harm of one provider discontinuing service.

Consumers should have ample warning when their Internet access providers discontinue service. Switching to a new provider entails transaction costs for consumers (*e.g.*, time, money, and possibly new equipment). Furthermore, there are *not* enough alternative broadband access providers in many areas of the country, and, indeed, there are still plenty of areas without *any* broadband access at all. In sum, the Ratepayer Advocate recommends that the Commission not assume that customers can move easily and quickly from one broadband access provider to another, but rather ensure that consumers are amply notified when providers plan to discontinue service.

The Commission should consider carefully the implications of rate averaging for broadband deployment objectives.

Given that customers are substituting broadband services for narrowband services that were covered by Section 254(g), the Commission asks whether it should impose rate averaging requirements for broadband providers:

> The Commission has forborne from the requirements of section 254(g) with regard to private line services, of which DSL is one. [31]

[31]/ *NPRM*, at para. 157.

The potentially competing objectives in any discussion about rate averaging are (1) the objective of establishing accurate pricing signals to encourage efficient investment (which would suggest that rate averaging is inappropriate) and (2) universal service to encourage widespread deployment of broadband services (which would suggest that rate averaging is appropriate). A related issue is the degree to which high cost funds should be used to subsidize broadband deployment. Should such the FCC pursue such a use of the high cost funds, it is critically important that the need for support, if any, be based on forward looking economic costs rather than embedded ones.

State leadership is essential in designing and enforcing consumer protection.

The Commission seeks comment on the question of who has jurisdiction to enforce regulations relating to broadband:

> We note in this regard that NARUC has recently advocated for a "functional" approach to questions of federal and state jurisdiction, particularly with respect to consumer protection issues. For example, with respect to CPNI, NARUC recommends that the Commission be primarily responsible for establishing rules, while state or local authorities assume responsibility for enforcing those rules.[32]

Additionally, the Commission asks how it can "harmonize" federal and state regulatory and enforcement efforts. States, which are on the "front line," have a long history of establishing and enforcing consumer protection and consumer privacy, such as in areas of alternative operator services, slamming, caller identification, and billing. The Ratepayer Advocate urges the Commission to clarify that states have independent authority and concurrent jurisdiction over broadband, including consumer protection issues based upon Constitutional considerations. See Ratepayer Advocate's *ex parte* filing dated December 7,

[32]/ *NPRM*, at para. 158.

2004 for a discussion of the Constitutional implications.[33] The Ratepayer Advocate incorporates by reference this *ex parte* filing in its comments. States often are the most familiar with and knowledgeable about the implications of market imperfections for consumers.

Universal service support for broadband and government oversight of ILECs' fiber deployment plans are critical to narrow the digital divide.

The Ratepayer Advocate also addresses issues that this proceeding implicitly raises, specifically concerning the uneven deployment of new technologies among various socioeconomic segments of the nation. As part of its participation in the Commission's and the New Jersey Board of Public Utilities' ("Board") investigations of the SBC/AT&T merger and the Verizon/MCI merger (hereinafter "Major Mergers"), the Ratepayer Advocate had the opportunity to review numerous documents regarding fiber deployment and marketing strategy.[34] Based on this review, as a threshold mater, the Ratepayer Advocate urges the Commission to coordinate with states in monitoring (1) the ILECs' splintering of the market among the "technologically savvy" and POTS customers and (2) the communities in which ILECs are rolling out fiber to the premises ("FTTP") or fiber to the curb. The purposes of such regulatory oversight are to ensure that ILECs are not neglecting some market segments or cross-subsidizing their pursuit of competitive services with revenues from noncompetitive services. See Figure 6 attached to these comments.

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[33]/ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket, No. 01-338 and WC Docket No. 04-313.

[34]/ *In the Matter of Verizon Communications Inc. and MCI, Inc., Applications for Approval of Transfer of Control, WC Docket* No. 05-75; *Joint Petition of Verizon Communications Inc. and MCI, Inc. for Approval of Merger, New Jersey Board of Public Utilities*, Docket No. TM05030189. In the Matter of SBC Communications Inc. and AT&T Corp. Applications for Transfer of Control, WC Docket No. 05-65; *Joint Petition of SBC Communications Inc. and AT&T Corp. Together With Its Certificated Subsidiaries for Approval of Merger, New Jersey Board of Public Utilities*, Docket No. TM05020168.

The Ratepayer Advocate's review of internal documents provided to the Commission in the Major Mergers proceedings indicate that Incumbent Local Exchange Carriers and Competitive Local Exchange Carriers telecommunications providers are actively segmenting the market in order to focus resources and marketing efforts on those segments that will generate the most profit.[35] Those who do not subscribe to bundles of services, those who do not have and/or want access to the Internet, low-income customers, and low-use customers are the least likely to benefit from concerted market segmentation.[36] Among the customer "segments" are those customers seen by the telecommunications companies as either "no frills" or POTS customers. In the recent federal and state merger proceedings, the records in each proceeding show that the market segmentation efforts exist now for and exclude the "no frills" telecommunications customers for whom the mergers will provide no benefits. Elderly, low-use, and low-income consumers are least likely to be able to avail themselves of intermodal alternatives and the incumbents' broadband offerings, such as FTTP deployment.

Elderly consumers are less likely to use the Internet than the average consumer. According to a report issued in 2004, 22% of Americans age 65 or older reported having access to the Internet. By contrast, the report also states that, as of February 2004, 58% of Americans age 50-64, 75% of 30-49

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[35] / *See, e.g.*, WC Docket 05-75, VZFCC-048-282 through 407; VZFCC-049-0000008 thru 12 ; and VZFCC045-0001711.

[36] / *See*, also, VZFCC-045-0000499; VZFCC-045-0000011

year-olds, and 77% of 18-29 year-olds go online as of February 2004."[37]

The use of broadband declines as household income declines. The US Department of Commerce's National Telecommunications and Information Administration ("NTIA") included the following data in a 2004 report, based on the Current Population Survey conducted in October 2003.[38]

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[37] / "Older Americans and the Internet," Pew Internet & American Life, Principal author: Susannah Fox, March 25, 2004, at 1. The report also indicates that in February 2004, "17% of wired seniors live in high-income households, compared to 4% of all seniors. It is important to note, however, that fully 39% of seniors refused to answer the income question in February 2004." *Id*., at 2. Also, "[s]eventy-two percent of wired seniors who go online at home have a dial-up connection, compared to 54% of the general Internet population who go online from home." *Id*., at 3.

[38] / "A Nation Online: Entering the Broadband Age," US Department of Commerce, Economics and Statistics Administration, National Telecommunications and Information Administration, September 2004, Appendix Table 1. http://www.ntia.doc.gov/reports/anol/NationOnlineBroadband04.doc. *See*, also, "Are We Really a Nation Online? Ethnic and Racial Disparities in Access to Technology and Their Consequences," Report for the Leadership Conference on Civil Rights Education Fund, Robert W. Fairlie, September 20, 2005. The author concluded that the "Digital Divide is large and does not appear to be disappearing soon." The study found that Blacks and Latinos were less likely to have access to the Internet in the home (40.5% and 38.1, respectively compared to an access rate of 67.3% for Whites). *Id*., at i. Differences in income and education levels were the two largest explanatory variables for this disparity. *Id*., at ii.

Table 1

Percentage of U.S. Individuals Age Three and Older Living in a Broadband Household, by Family Income (as of October 2003)	
Family Income	*Percentage Living in Broadband Household*
Less than $15,000	7.5%
$15,000 - $24,000	9.3%
$25,000 - $34,999	13.4%
$35,000 - $49,999	19.0%
$50,000 - $74,999	27.9%
$75,000 and above	45.4%
$75,000 - $99,999	36.8%
$100,000 - $149,999	49.3%
$150,000 and above	57.7%
Source: US Dept. of Commerce, Economics and Statistics Administration, National Telecommunications and Information Administration, *A Nation Online: Entering the Broadband Age*, September 2004, Appendix Table 1.	

Similarly, the probability of being without access to the Internet increases as income declines. The NTIA also analyzes the percentage of "non-Internet-using" households by income. Table 2, below summarizes this information.

Table 2

Percentage of U.S. Individuals Reported as Non-Internet Users, by Family Income (as of October 2003)	
Family Income	*Percentage of Non-Internet Users*
Less than $15,000	68.8%
$15,000 - $24,000	62.0%
$25,000 - $34,999	51.1%
$35,000 - $49,999	37.9%
$50,000 - $74,999	28.2%
$75,000 and above	17.1%
$75,000 - $99,999	20.2%
$100,000 - $149,999	14.9%
$150,000 and above	13.9%
Source: US Dept. of Commerce, Economics and Statistics Administration, National Telecommunications and Information Administration, *A Nation Online: Entering the Broadband Age*, September 2004, Appendix Table 2.	

Finally, the NTIA report includes an analysis of the mode of access to the Internet by household. As the following data from the NTIA report clearly demonstrates, among Internet households, the use of dial-up access is relatively more prevalent among relatively lower income households and the use of broadband (or "high speed") access increases as household income increases. Among other implications, the much-touted intermodal alternative of VoIP, which depends on broadband access, is less likely to provide an economic substitute to basic telephone services ("POTS") for low-income households.

Table 3[39]

Internet Connection Types for U.S. Households (as of October 2003)							
Family Income	*Total Internet Households (000s)*	*Dial-Up Telephone*		*Cable Modem*		*Digital Subscriber Line (DSL)*	
		No.	*%*	*No.*	*%*	*No.*	*%*
	61,481	38,593	62.8%	12,638	20.6%	9,335	15.2%
Less than $15,000	3,681	2,555	69.4%	584	15.9%	477	13.0%
$15,000 - $24,000	3,839	2,786	72.6%	600	15.6%	418	10.9%
$25,000 - $34,999	5,855	4,137	70.7%	921	15.7%	694	11.9%
$35,000 - $49,999	8,867	6,213	70.1%	1,391	15.5%	1,138	12.8%
$50,000 - $74,999	12,429	7,918	63.7%	2,531	20.4%	1,814	14.6%
$75,000 - $99,999	7,774	4,440	57.1%	1,919	24.7%	1,321	17.0%
$100,000 - $149,999	5,811	2,726	46.9%	1,771	30.5%	1,207	20.8%
$150,000 and above	3,753	1,482	39.5%	1,242	33.1%	961	25.6%
Source: US Dept. of Commerce, Economics and Statistics Administration, National Telecommunications and Information Administration, *A Nation Online: Entering the Broadband Age*, September 2004, Appendix Table 4.							

According to the Bureau of Census' American Community Survey, 55% percent of U.S. households have incomes below $50,000.[40] The survey reported by the NTIA demonstrates clearly

[39] / The NTIA report also includes data for the following categories: mobile/phone/PDA/pager, satellite, fixed wireless and other. For each of these categories, the percentages shown are less than one percent.

[40] / U.S. Bureau of Census, 2004 American Community Survey, Selected Economic Statistics: 2004. U.S. median household income (that is, the income level above which half the households have more income and half the households have less income) in 2004 was reported as $44,684. The median household income in New Jersey is $61,389 for 2004 (in 2004 dollars). Just over 41 percent of New Jersey households have incomes below $50,000. U.S. Bureau of Census, 2004 American Community Survey, Selected Economic Characteristics: 2004.

that as income declines, the probability of Internet access declines, and, in those instances where households do have Internet access, as income declines, the probability of broadband (rather than dial-up access) also declines. The ILECs are clear winners from the FCC's ruling in this broadband proceeding,[41] which eliminated mandated sharing for wireline broadband Internet access. In this proceeding, the Commission could develop policies that help "speed the deployment of affordable broadband services to all Americans" and to "preserve our ability to support the deployment of these services for consumers that the market may leave behind."[42]

The broadband deployment strategy that the Major Merger participants are now pursuing in various states will establish a significant gulf between communities with broadband and those without broadband. The evidence the Ratepayer Advocate reviewed in the Major Megers overwhelming demonstrates that fiber deployment plans favor well-to-do communities and include a bare minimum deployment of fiber in low-income communities.[43] Numerous strategic company documents underscore the evolving digital divide in New Jersey and other states. Of course, further concerns are raised here that low-income, low-use consumers will be harmed when their communities are not targeted for broadband rollouts and again when local, regulated service revenues and facilities cross-subsidize the ILECs' development, marketing and deployment of new broadband technologies.[44]

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[41] / *Report and Order and NPRM*.

[42] / *Id.*, Separate Statement of Commissioner Jonathan S. Adelstein, concurring, at 131 and 132.

[43] / *See*, WC Docket 05-75, VZFCC 049-0001835.pdf; VZFCC 050-2121 through 2125.

[44] / *See*, WC Docket 05-75, VZMCI-0120000002 through 42; VZFCC-046-5410, VZFCC 049-0001348.

Consumer groups and regulators across the country have expressed concerns regarding the disparate rollout of broadband technologies the ILECs appear to be undertaking. A press release issued by the California Public Utilities Commission in October 2005 states:

> As a condition of approving the mergers, the Commission also required both companies to contribute a combined total of $60 million to an infrastructure fund for emerging broadband technologies. The California Emerging Technology Fund (CETF) would be established by the Commission as an independent non-profit entity that would focus on building broadband networks in areas with limited access to high-speed Internet service. The Commission established a similar fund for emerging energy technologies (The California Clean Energy Fund) as a condition of approving the PG&E reorganization plan in 2003.CETF funds would be used to attract matching funds from other non-profit organizations, corporations, and government entities. It is anticipated that the initial endowment of $60 million ($45 from SBC and $15 from Verizon) would be matched with funds from other sources to reach a total goal of $100 million over five years. The purpose of the CETF is to fund deployment of broadband facilities in underserved communities, defined as communities without broadband service, communities with access to only one broadband service provider other than satellite, or below average broadband adoption rates. Communities with below average adoption rates primarily include low-income households, ethnic minority communities, disabled citizens, seniors, small businesses, and rural or high-cost geographic areas. The CETF would also focus on deployment of broadband facilities to bring critical advanced services to high cost and rural areas, such as telemedicine and online education. "This Commission is committed to 100 percent access in the next five years," President Peevey said. Commissioner Kennedy added, "This fund is aimed at building those last mile connections that are the hardest to reach, and tend to be uneconomical for the private sector to serve. It won't replace private sector investment – it will supplement it. With the right combination of funding, we can bring key services such as telemedicine to the far reaches of the state.[45]

[45] / California Public Utilities Commission News Release, Docket Nos: SBC/AT&T: A.05-02-027and Verizon/MCI: A.05-04-020, "PUC Regulators Recommend Approval Of Telecom Mergers; ApprovalConditioned On Customers' Right To 'Stand-Alone DSL,' Addressing 'Digital Divide'" released October19, 2005; *See* also, letter to the Honorable Thomas Barnett, Acting Assistant Attorney General, AntitrustDivision and the Honorable Kevin J. Martin, Chairman of the Federal Communications Commission, datedJuly 29, 2005, from U.S. Senate, from Senators: Mike Devine, Chairman, Subcommittee on Antitrust,Competition Policy and Consumer Rights, and Herb Kohl, Ranking Member, Subcommittee on Antitrust, Competition Policy and Consumer Rights.

Federal and state cooperation is critical to ensure that broadband is deployed throughout all communities. As Commissioner Adelstein stated, "[t]hese technologies [wireline broadband Internet access services, the high-speed DSL and fiber-to-the-home connections] are evolutionizing the way that consumers connect, learn, work, and socialize through the Internet."[46]

The development of a "two-tiered Internet" raises serious concerns about undue discrimination.

The Ratepayer Advocate is also dismayed by recent media reports of a new campaign by regional Bell operating companies ("RBOC") to cripple or slow Internet traffic to and from third party content providers which do not agree to begin paying for use of the network. In effect, the RBOCs may attempt to create a two-tiered Internet, where their own services are offered to consumers at high quality and high speed, while signals from competing companies are intentionally degraded or slowed.

BusinessWeek Online reports that AT&T CEO Edward Whitacre in a recent interview declared, "What [Google, Vonage, and others] would like to do is to use my pipes free. But I ain't going to let them do that."[47] The article explains that network providers are no longer content simply to provide the infrastructure. They now:

> also want to peddle more lucrative products, such as Internet-delivered TV programs, movies, and phone calls… But selling those extras puts the phone and cable companies in competition with Web services big and small. The network operators

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[46] / *NPRM*, at 130.

[47] / "At Stake: The Net as We Know It," Catherine Yang, Roger O. Crockett, and Moon Ihlwan, BusinessWeek Online, December 26, 2005.

> could block consumers from popular sites such as Google, Amazon, or Yahoo! in favor of their own. Or they could degrade delivery of Web pages whose providers don't pay extra. Google's home page, for instance, might load at a creep, while a search engine backed by the network company would zip along. "This new view of the world will break apart the Internet and turn it into small fiefdoms" divided between the network providers' friends and foes, says Vonage Chief Executive Jeffrey A. Citron.[48]

The Ratepayer Advocate is concerned that efforts to install "toll booths" in broadband access networks will not only impede innovation, but will also create new financial hurdles for consumers wishing to take advantage of the Internet. The FCC, in fact, has already issued a consent decree in one case involving a broadband access provider blocking a third-party service.[49] In November 2004, a customer of Madison River Communications, LLC ("Madison"), a broadband access provider, found that he could no longer access his Vonage VoIP account. When he complained to Madison, he was told that the company had begun blocking calls through Internet phone companies such as Vonage. After an investigation by the FCC, Madison agreed to pay a $15,000 fine and to refrain from blocking Internet telephone activity.[50]

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[48] / *Id*.

[49] / *In The Matter of Madison River Communications, LLC and affiliated companies*, File No. EB-05-IH-0110, *Consent Decree*, Rel. March 3, 2005.

[50] / "At Stake: The Net as We Know It."

Some industry analysts believe that resolution of the "two-tier Internet" may turn on the concept of "common carriage," or the responsibility of network owners to provide service on a non-discriminatory basis. As Professor Eli M. Noam of Columbia University points out,

> Common carriage, after all, is of substantial social value. It extends free speech principles to privately-owned carriers. It is an arrangement that promotes interconnection, encourages competition, assists universal service, and reduces transaction costs. [51]
>
> The common carrier system has served telecommunications participants well: it has permitted society to entrust its vital highways of information to for-profit companies, without the specter of unreasonable discrimination and censorship by government or private monopolies; it was an important element in establishing a free flow of information, neutral as to its content; it reduced the administrative cost and the burden of liability of a carrier, since it needed not, at least in theory, inquire as to a user's background and intended use; and it protected the telephone industry from various pressure groups who would prevent it from offering service to their targets of protest or competition.[52]

III. CONCLUSION

The Ratepayer Advocate supports the Commission's timely efforts to address the pressing need to ensure that consumers continue to be protected as they migrate from traditional telephone services to a broadband platform. Moreover, the Ratepayer Advocate urges the Commission to recognize and affirm the concurrent jurisdiction of states, consistent with the U.S. Constitution over broadband and the concurrent

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[51] / "Beyond Liberalization II: The Impending Doom of Common Carriage (working paper)," Eli M. Noam, Columbia Institute for Tele-Information, March 15, 1994, (available at http://www.columbia.edu/dlc/wp/citi/citinoam12.html),at Introduction.

[52] / *Id*., at Section 2.

and critically important role that states have in leading the way on consumer protection rules and enforcement. Finally the Ratepayer Advocate urges the Commission to take steps to close the digital divide and to prevent undue discrimination in access to the Internet.

Respectfully submitted,

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