

Before the
Federal Communications Commission
Washington DC 20554

In the Matter of the Petition of		
The United Power Line Council		
For a Declaratory Ruling Regarding the		WC Docket No. 06-10
Classification of Broadband Over Power		
Line Internet Access Service As		
An Information Service		

**REPLY COMMENTS OF CURRENT COMMUNICATIONS GROUP, LLC
IN SUPPORT OF PETITION FOR DECLARATORY RULING**

Pursuant to Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, and the Commission's January 11, 2006 Public Notice, CURRENT Communications Group, LLC¹ submits these reply comments in support of the United Power Line Council ("UPLC") Petition For Declaratory Ruling that Broadband over Power Line ("BPL")-enabled Internet access service ("BPL Internet Service") is an "information service" as defined in 47 U.S.C. § 153(20). The record in this proceeding overwhelmingly demonstrates that UPLC's request should be granted forthwith. Indeed, no commenter offers any legal or factual basis that even purports to challenge the Petition's contentions. The handful of parties that suggest that the Commission

¹ CURRENT Communications Group, LLC, ("CURRENT") based in Germantown, Maryland, is the nation's leading Broadband over Powerline multiple systems operator. Through its two subsidiaries – CURRENT Communications and CURRENT Technologies – the Company develops, builds and provides innovative, proprietary BPL technology and services for delivering broadband services domestically and internationally using BPL technology. CURRENT offers high speed broadband services over existing electric power lines and in-home electric wiring. CURRENT offers a fully integrated, end-to-end solution, including developing and providing state-of-the-art BPL equipment as well best-in-class business solutions and service capabilities to operate and manage a BPL deployment and broadband business. In 2004, CURRENT was the first company to launch BPL on a commercial basis, in Cincinnati, Ohio. In December 2005, CURRENT announced a BPL deployment with TXU Electric Delivery that will cover approximately 2 million homes in the Dallas-Fort Worth area.

should somehow condition or delay its classification of BPL Internet Service offer arguments that are simply irrelevant to the issue presented by the Petition.

As an initial matter, it is important to note that the UPLC Petition does not seek clarification of the regulatory classification of “BPL.” Broadband over Power Line is not a service, but rather a technology that, like cable modem over coaxial cable, DSL over twisted-pair copper wire and fiber optic cables can be used to deliver a variety of services. Instead, UPLC explicitly asks the Commission to rule concerning “BPL-enabled Internet access service” – a specific category of end user services that can be provided via BPL. The Commission already has concluded, and the Supreme Court has affirmed, that broadband Internet service provided via cable systems is an information service.² Relying on the logic of the cable modem ruling, the *Wireline Broadband Order* readily held that broadband Internet services provided over telephone wires should be classified in the same manner.³

The *Wireline Broadband Order* concisely stated its fundamental rationale: “what matters is the finished product made available through a service rather than the facilities used to provide it.” *Id.* ¶16. The Commission has repeatedly held that Internet access service is an information service, and the logic of those prior rulings compels the same result in the instant proceeding. This classification applies “regardless of whether subscribers use all of the functions and capabilities provided as part of the service (*e.g.*, e-mail or web-hosting)” and regardless of whether a “service provider offers each function and capability that could be included in that

² *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).

³ *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

service.” *Id.* ¶15. An end user “receives more than transparent transmission whenever he or she accesses the Internet” (*Id.*), whether he or she does so using BPL, or via cable modem or DSL.

The commenters who propose that the Commission delay or somehow “condition” its recognition of BPL Internet Service’s proper statutory classification rely on arguments that have no bearing on the question before the Commission. For example the National Telecommunications Cooperative Association (“NTCA”) argues (p. 4) that because BPL is a nascent technology, UPLC’s request should be tabled until there is evidence that BPL Internet Service is “exerting competitive pressures on the high speed Internet market.” But the proper classification of BPL Internet Service in no way depends on its attainment a certain level of market penetration. In fact, to impose such an extra-statutory requirement would saddle a promising new entrant to the consumer broadband marketplace with regulatory uncertainty that the key incumbent players, cable and DSL, do not face. Similarly, the suggestions by the Pennsylvania PUC (pp. 2-3) and the New Jersey Ratepayer Advocate (pp. 4-5) that action on the UPLC Petition should await the resolution of other FCC proceedings and pending petitions for reconsideration has no sound legal basis. In the absence of a stay, a petition for reconsideration or pending proceeding does not affect the enforceability of existing Commission rules and orders.⁴ To the extent future Commission decisions impose requirements on providers of broadband Internet, VoIP or other services, those requirements would apply, absent some pertinent exception, when the same services are offered via BPL.

Other commenters suggest that BPL Internet Service’s classification should be contingent on the granting of specific proposals they endorse, but which are unrelated to the proper

2347773 (“*Wireline Broadband Order*”).

⁴ 47 U.S.C. § 405.

interpretation of Section 153(20). For example, NextG (pp. 1-2) and Virtual Hipster (p. 1) propose that the Commission should revise its pole attachment rules to prevent potential discrimination by pole-owning electric utilities. This argument does not bear even a tangential relation to the Communications Act's definition of "information service" and there is thus no lawful basis on which pole attachment practices could affect the classification of BPL Internet Service.

Although Panasonic "urges the Commission to grant the UPLC Petition" (p. 8), it also argues that the statutory classification of BPL Internet Service should be contingent on adoption of a frequency sharing regime for Access and In-House BPL. Its comments, however, do not even attempt to link this proposal to Section 153(20)'s definition of "information service," and cannot explain how the Commission could lawfully "condition" its statutory interpretation in such a manner. Panasonic unsuccessfully offered similar frequency allocation requests in a 2004 Commission proceeding relating to BPL.⁵ The Commission should reject the attempt to use this unrelated proceeding to bootstrap into further consideration of these proposals.

Other commenters voice concerns that, while addressing valid public policy issues, are nevertheless irrelevant to an inquiry into whether BPL Internet Service is an information service. The Pennsylvania PUC and the New Jersey Ratepayer Advocate each raise questions concerning federal and state roles in regulating BPL Internet Service and Internet service generally. The NTCA mentions (pp. 7-9) concerns about potential cross-subsidies between electric utilities and BPL providers, and about VOIP providers' contributions to universal service funds. Plainly, the

⁵ See Letter of June 16, 2004 from Bruce Turnbull, Weil Gotshal & Manges to Marlene Dortch, Secretary, Federal Communications Commission in *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*, ET Docket Nos.

Commission need not resolve all outstanding issues in order to grant the UPLC Petition – just as it did not resolve all such issues in the *Cable Modem Declaratory Ruling* or the *Wireline Broadband Order*.⁶ BPL Internet Service’s status as an information service can and should be determined independent of such issues.

03-104 and 04-37.

⁶ The New Jersey Ratepayer Advocate’s claim (p. 3) that classification of BPL Internet Service as an information service is somehow complicated by the fact that electric distribution facilities are subject to state regulation is not well-founded. DSL service is also provided in part over facilities that are subject to state commission jurisdiction (local telephone facilities), but the *Wireline Broadband Order* did not find this fact relevant in classifying Internet access via DSL as an information service.

CONCLUSION

CURRENT respectfully urges the Commission to grant the UPLC Petition by ruling that BPL Internet Service is an “information service” as that term is defined in 47 U.S.C. § 153(20).

Respectfully submitted,

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