

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

**THE REPLY COMMENT OF
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

The Pennsylvania Public Utility Commission (PaPUC) hereby submits this Reply Comment in response to the Comments filed on February 10, 2006 in response to the FCC's notice published at DA 06-49 on January 11, 2006. The PaPUC appreciates the opportunity to file a Reply Comment. As an initial matter, the PaPUC's Reply Comment should not be construed as binding on the PaPUC in any proceeding before the PaPUC. Moreover, the suggestions contained in this Comment may change in response to subsequent events. This includes developments at the federal or state level.

Summary

The PaPUC's Reply Comment suggests that the UPLC Petition raises one critical issue with long term ramifications on federal policy and the federal-state relationship. That issue is continuation of the Title II consumer protections and common carrier obligations under federal law as a result of

the legal classification of the *facilities* and *services*, including content, provided by Internet Protocol (IP) and internet access.

The PaPUC also suggests that the FCC has three options on this legal decision. The FCC can classify the *facilities* and *services* under Title II and impose consumer protection and common carrier obligations on the *facilities* and *services*. Second, the FCC could classify the *facilities* and *services* as information services and not impose any Title II consumer protection or common carrier obligations. Third, the FCC could classify the *facilities* under Title II and the *services* as information services under TA-96.

If the FCC classifies the *facilities* and *services* as “telecommunications” services under Title II, the FCC may be better positioned to impose all the Title II consumer protection and common carrier obligations. A broad sweep to include *facilities* and *services* under Title II could embroil the FCC in content matters. However, a narrowly tailored result that reaches only *facilities* under Title II to protect consumers and access for providers without facilities may be preferable.

If the FCC classifies the *facilities* and *services* as “information” services, the FCC may well be unable to impose any Title II consumer protection and common carrier obligations. And even if the FCC could somehow invoke the ancillary authority of Title I to protect consumers, the FCC may be prevented from extending that ancillary authority to ensure access for providers without facilities if the FCC previously refused to take that approach under Title II. The FCC’s ability to protect consumers or ensure access by providers without facilities under Title I may not be

sustainable in light of the recent decision of the District of Columbia Circuit Court in *American Library Association v. Motion Picture Association of America*, No. 04-1087 (D.C. Cir. 2005). In that decision, the District Court rejected the FCC's exercise of "ancillary" authority under Title I as beyond the scope of the agency's delegated authority. Consequently, the FCC runs the very real risk that the District Court may take that approach if the FCC relies on Title I to impose consumer protections or common carrier obligations expressly rejected by any FCC decision to not include the *facilities*, as opposed to the *services*, within Title II.

If the FCC classifies the *facilities* as telecommunications under Title II and the *services* as information services under TA-96, the FCC could be better positioned to protect consumers and ensure that *service* providers without facilities have access to *facilities* to serve consumers.

The PaPUC suggests that the FCC recognize, however, that whatever the merits and ramifications of these legal and policy options, the record in this particular proceeding¹ seems insufficiently developed to defend any decision. The PaPUC urges the FCC to conclude that the better developed records in the IP-Enabled Services and ICC NOPRs are better proceedings to decide this complex legal issue.

Detailed Discussion

¹Moreover, the PaPUC suggests that the record in the *DSL Wireline Broadband* proceeding may also suffer from this same defect. And, consistent with the PaPUC's Comment, the PaPUC suggests that the legal classification issue in the *Wireline Broadband* proceeding may be better addressed in the IP-Enabled Services and ICC NOPRs as well. For that reason, the suggestions made in the PaPUC Comment and Reply Comment also apply to that proceeding.

The PaPUC identifies three important considerations set forth in the Comments about the critical issue of legal classification under federal law. First, the ancillary issues raised in the Comment suggest that the FCC consider carefully the wisdom of resolving the technical, engineering, legal, and policy matters based on the record in this proceeding. Second, the legal interpretations proposed in the Comments on the meaning of the *Brand X*, *Broadband Wireline Proceeding*, *Southern Company*, and *American Library* decisions are contradictory and incapable of thorough disposition in this limited proceeding. The PaPUC suggests that better forums for considering these matters exist in the better developed records of the pending BPL proceeding as well as the IP-Enabled Services and ICC NOPRs.

1. The PaPUC suggests that the FCC proceed cautiously on the UPLC Petition given the significant legal, factual, and anticompetitive allegations in the Comments.

The PaPUC Reply Comment makes several suggestions. First, the PaPUC suggests that the Comments of Panasonic, FirstCom, Comptel and the Joint Cable Operators identify significant legal, engineering, and ancillary access issues. These issues reinforce the PaPUC's earlier suggestion that this docket may not be the best forum for a thorough consideration of the issues. The issues raised in the Comments are under examination in the BPL proceeding as well as the IP-Enabled Services and ICC NOPRs.

The PaPUC urges the FCC to consider not making a definitive legal pronouncement on these interpretations based on the limited record in this proceeding. The PaPUC suggests that such matters are pending and better addressed in more developed records. The PaPUC urges the FCC to address

these matters in those dockets. Finally, the PaPUC suggests that the totality of the allegations and interpretations appear to be “new matter” not otherwise raised or considered in the record.

2. The PaPUC suggests that the legal interpretations proposed in the Comments do not provide the certainty needed to decide the UPLC Petition in this proceeding.

The PaPUC notes that the Comptel, FirstCom, the JCO, and Duke Energy Comments propose contradictory legal interpretations of court decisions in the *Brand X*, *Southern*, and *American Library* decisions. Those Comments are sufficient to suggest that the FCC may be unable to defend a decision based on the Comments.

The PaPUC urges the FCC to consider these positions and interpretations in the records of the pending and more complex IP Enabled Services and ICC NOPRs. The PaPUC further suggests that issues such as Panasonic’s “coexistence protocols” for mitigating interference and the Cable Operators’ proposals for “capacity” rights of way are engineering matters. It may be better to address those issues in the pending Petitions for Reconsideration at ET Docket No. 04-37 before making a decision in this docket.

3. The PaPUC is concerned that new observations about virtual duopolies, coexistence protocols, and pole attachments are new matters that need resolution before the UPLC Petition.

The PaPUC suggests that the Comments have raised important matters. These include the existence of virtual duopolies, whether BPL contains a separate or integrated transmission component, the necessity for

coexistence protocols, and the need to resolve pole attachment practices. The PaPUC is concerned that a rushed decision in this docket notwithstanding these considerable issues may produce more litigation and uncertainty. The PaPUC urges the FCC to consider a more measured evaluation of these issues using the records in the IP-Enabled Services and ICC NOPRs.

The PaPUC notes that the Comments evidence a considerable amount of disagreement on the interplay of Title II consumer protections and common carrier requirements with the prior decisions on the FCC's authority under Title I. The PaPUC suggests that these interpretations raise very serious matters that need resolution and that the record in this proceeding may be simply inadequate to address them.

Moreover, a rushed decision to legally classify BPL *facilities* and *services* could embroil the FCC in litigation. Such litigation produces far more market uncertainty than avoiding a rushed decision in order to make a more reasoned and defensible one in better developed proceedings.

In sum, the PaPUC suggests that the totality of factual and legal issues raised in the Comments warrant denial of the Petition in favor of more comprehensive decisions in the better developed records in pending dockets. The PaPUC urges the FCC to consider whether there is a genuine need to issue an order in this proceeding when the issues are better addressed in the pending BPL proceeding as well as the IP-Enabled Services and ICC NOPRs.

Respectfully submitted,

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