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

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

**REPLY COMMENTS
OF THE
NATIONAL ASSOCIATION
OF STATE UTILITY CONSUMER ADVOCATES**

Pursuant to Section 1.415(c) of the Federal Communications Commission’s (“FCC” or “Commission”) Rules,¹ the National Association of State Utility Consumer Advocates (“NASUCA”)² hereby submits these reply comments in this proceeding.

I. INTRODUCTION AND SUMMARY

Predictably, most of the telecommunications carriers and industry groups filing comments generally urged the Commission not to ensure the vital consumer protections in the broadband era that are discussed in the Notice of Proposed Rulemaking (“NPRM”) released by the Commission at this docket on September 23, 2005. As discussed further below, many of these commenters argued that “the market” or “competition” will provide the necessary

¹ 47 C.F.R. § 1.415(c).

² NASUCA is a voluntary association of 45 advocate offices in 42 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA’s members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. *See, e.g.,* Ohio. Rev. Code Ch. 4911; 71 Pa. Cons. Stat. Ann. § 309-4(a); Md. Pub. Util. Code Ann. § 2-205; Minn. Stat. § 8.33; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.,* the state Attorney General’s office). NASUCA’s associate and affiliate members also serve utility consumers, but are not created by state law or do not have statewide authority.

consumer protections and that the Commission should not now ensure additional consumer protections. Many of these commenters argued for a “wait and see” approach to consumer protections. These arguments are without merit and should be rejected by the Commission.

Instead, broadband Internet access service providers should welcome the vital consumer protections discussed in the NPRM and NASUCA’s initial comments filed in this proceeding on January 17, 2006. Broadband Internet access service providers should recognize that ensuring such consumer protections will not be unduly burdensome but, instead, will create greater opportunities for their service to grow by providing consumers with the level of comfort and ease that will encourage them to continue, and then increase, their use of the broadband services. NASUCA showed in its initial comments how market forces have already proven to be insufficient to provide necessary protections for consumers, which in turn has caused consumers to shy away from many broadband services. This is particularly true given the growing concern over competitors’ access to the broadband network as owners of broadband facilities increase their threats to provide inadequate service to competitors. The Commission should not set a standard for failure by which consumer protections will be afforded only after more consumers fall prey to abusive or fraudulent practices, or generally inadequate service.

Furthermore, the Commission should reject arguments in favor of blanket preemption of states’ ability to provide consumer protections in the broadband era. In ensuring consumer protections, the Commission should maximize the use of both federal and state resources by encouraging cooperation between the two jurisdictions.

The Commission should not accept arguments that consumers can “vote with their feet” and simply discontinue service with a broadband Internet access service provider if they believe that their service is inadequate. Consumers are generally tied to long-term contracts with

providers and generally cannot break those contracts without substantial termination fees, even if the service they paid for is not the quality or nature of service they were promised.

The benefits to society from broadband services are too critical for this Commission not to ensure the vital consumer protections discussed in the NPRM. The Commission should take steps in this proceeding to ensure equal access of all broadband Internet access service providers to the broadband network. The Commission should ensure that universal service funding obligations are required of all providers of broadband service. The Commission should ensure the privacy and reliability of the broadband network for consumers. And the Commission should allow for reasonable redress of complaints when consumers are not adequately satisfied with their broadband Internet access service provider.

NASUCA reiterates its earlier comments in this proceeding and supports those comments filed by other consumer groups that are consistent with NASUCA's positions. NASUCA urges this Commission to reject the arguments of the broadband Internet access service providers who, as discussed below, make arguments that are contrary to the public interest. The Commission should enter an Order that contains, at a minimum, the vital consumer protections articulated in NASUCA's initial comments.

II. REPLY COMMENTS

A. The Commission Should Reject Arguments That “Market Forces” or “Competition” Will Provide Necessary Consumer Protections in the Broadband Era.

In its comments, NASUCA correctly anticipated that numerous comments would generally assert that the “the market” or “competition” will provide necessary consumer

protections and that the Commission should not ensure additional consumer protections.³ In its comments, NASUCA noted that

all too often “the market” has failed to provide essential consumer protections. The Commission should not now assume that marketplace-generated consumer protections have kept pace with the proliferation of the broadband network despite the numerous services and benefits it carries.⁴

As anticipated, many commenters argued in their initial comments that “market forces” will sufficiently provide necessary consumer protections in the broadband era, such that the Commission does not need to implement any non-economic regulations to ensure such protections in this proceeding. As NASUCA demonstrates here, these arguments are not convincing.

For example, AT&T said the Commission should “keep in mind that Congress intended for the Commission to rely on market forces, rather than regulation, to promote broadband deployment.”⁵ AT&T then argued, “there is generally no need for the Commission to extend its legacy, voice-centric consumer protection regulations to broadband Internet access service.”⁶ According to AT&T, “in today’s highly competitive marketplace for broadband Internet access service, providers have strong incentives to attract and retain customers by adopting pro-consumer policies and practices.”⁷ Similarly, Comcast asserted that competition provides every incentive to ensure that customers’ interests are properly served and argued that government mandates and regulations “would risk alienating its customers and having them switch to an

³ See e.g., NASUCA Comments at 3.

⁴ Id.

⁵ AT&T Comments at 1.

⁶ Id.

⁷ Id.

alternative broadband service provider.”⁸ Many other commenters made the same or similar arguments.⁹

Some commenters cite Section 230 of the federal Telecommunications Act of 1996 (“TA-96”) for support of their argument that market forces, rather than regulation, will provide sufficient consumer protections in the broadband era.¹⁰ Section 230 provides “it is the policy of the United States to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”¹¹ Many commenters argued that many consumer protections are being addressed through voluntary industry initiatives.¹² Many commenters also proposed a “wait and see” approach to broadband consumer protections.¹³ These various arguments are insufficient to overcome the need for the Commission to ensure non-economic consumer protections in this proceeding.

Arguments that “market forces” or “competition” will provide such protections are without merit and should be rejected. If the general unsupported arguments that the market and competition will provide consumer protection from scams, schemes and otherwise fraudulent behavior by the myriad telecommunications providers were valid, those arguments would likewise be valid for every other segment of commerce in which there is competition and there

⁸ Comcast Comments at 12. If the regulations were applied uniformly to Comcast and the “alternative broadband service provider,” Comcast should be able to distinguish itself on price or other aspects of service quality.

⁹ See e.g., CTIA Comments at 9; Comcast Comments at 1; BellSouth Comments at 4; NCTA Comments at 11-15; OPASTCO Comments at 2; Qwest Comments at 2; TIA Comments at 2; Time Warner Comments at 1, 4.

¹⁰ See, AT&T Comments at 3-4; Cingular Comments at 2.

¹¹ 47 U.S.C. § 230(b)(2).

¹² AT&T Comments at 2; BellSouth Comments.

¹³ See e.g. AT&T Comments at 4; BellSouth Comments at 8; Cingular Comments at 6; Comcast Comments at 3, 9; OPASTCO Comments at 4; USTA Comments at 1; CTIA Comments at 7, 11; Qwest Comments at 2.

would be no need for general consumer protection laws, the Federal Trade Commission (“FTC”) or state attorney generals’ consumer protection offices. Obviously, such is not the case.

Furthermore, these arguments fail to recognize the increasing use of broadband services to provide voice communications, an essential utility service. As more consumers use Internet broadband services for voice communications, competition alone cannot be relied upon to ensure protections such as, for example, a consumer’s ability to secure a prompt response in the event of an emergency. Without these necessary assurances, and a reasonably appropriate comfort level, consumers will not want to subscribe to services provided over the broadband network. At that time, *all* service providers will suffer economically.

A “wait and see” approach to the broadband market is neither fair nor realistic as a practical matter. Consumers have *already* been experiencing problems with their broadband service providers. For example, NASUCA provided evidence in its initial Comments regarding problems representative of what consumers have already been experiencing. Furthermore, no industry is insulated from having to provide consumer protections. Even the most competitive of markets are subject to laws designed to prevent abuse and fraud that make victims of the very customers that competitors are trying to “win over.” The Commission should not accept the industry’s assertions that the broadband Internet access market is without any pitfalls for consumers so that it is not in need of any consumer protections.

Given that problems already exist in the market, it is unreasonable for the Commission to wait until a certain number of problems accrue before putting protections in place. Ensuring such consumer protections after more problems occur is not in the public interest or sound public policy. There is sufficient basis for the Commission to put in place *now* the consumer protections discussed in the NPRM, and others, without having to wait for numerous “consumer-

related market failures” to arise, as some commenters have argued. Reason and proactive actions to avoid anticipated failures should guide this Commission to prevent failures from happening. It is reasonable to expect that such failures will occur, given that many already have and failures are inherent in a competitive environment, and the Commission should put in place some reasonable specific consumer protections now in an effort to minimize such failures. Despite the efforts of the Commission since its inception to protect consumers, the Commission is still inundated with complaints from consumers. The Commission should not wait until *more* consumers are charged for a service they do not want, get lost in a phone tree maze, or cannot reach emergency personnel because their broadband Internet telephone service was not reliable.

Furthermore, these commenters fail to recognize that the “competitive” market is a misnomer where there are industry-wide anti-consumer practices, or where underlying facilities are controlled by a cartel or a duopoly. These commenters have themselves provided relevant data that evidences the duopoly.¹⁴ For many people, there are, at best, only two owners of broadband facilities and, as such, those consumers are not afforded the same protections that a more competitive market would provide.

Relying on “market forces” or “competition” to provide consumer protections in the broadband era does not recognize that even competitive markets have a need for consumer protections. Industries routinely are required to provide certain basic consumer protections, *e.g.*, notice requirements, as well as product and/or service-specific consumer protections, *e.g.*, lost luggage (airlines), “lemon” cars (automobile industry), checks wrongfully honored or dishonored (banks), products and price disclosures (the funeral and real estate industries), etc.

¹⁴ See, BellSouth Comments at 5 (noting that 35.2 million of the 37.9 million customers who subscribe to broadband subscribe to either cable modem services or DSL services); Comcast Comments at 6. Also, USTA provides statistics regarding the number of zip codes that have two or more high-speed service providers. USTA Comments at 2; *see also*, Verizon Comments at 4, 21.

Regarding commenters' arguments that Section 230 of TA-96 prohibits the Commission from imposing non-economic consumer protections in this proceeding, NASUCA notes that being "unfettered by Federal or State regulation" does not mean *no* federal or state regulation. Furthermore, Section 230 pertains to "protection for private blocking and screening of offensive material."¹⁵ The plain language of Section 230, for example, protects the "internet *and other interactive computer services*."¹⁶ At the time Section 230 was enacted, Internet voice services were a distant reality. Instead, Section 230 focuses on giving parents greater control over what Internet material their child may access via their computers. Section 230 does not refer to broadband Internet access services, especially those that might serve as a substitute for wireline telephony. Commenters' reliance on Section 230 in this proceeding as a reason why vital consumer protections in the broadband era should not be ensured is misguided.

The Commission should be guided by the additional principles articulated by Congress in TA-96 that seek to promote the public interest. For example, Section 706(a) requires the Commission to encourage the deployment of advanced telecommunications services "*in a manner consistent with the public interest*."¹⁷

Cingular argued that a "light cautious hand is therefore required in this proceeding."¹⁸ Cingular further argued "new regulatory requirements could work to the detriment of consumers if they impose costs or burdens on providers, because any costs will inevitably be passed through

¹⁵ 47 U.S.C. § 230.

¹⁶ *See e.g.*, 47 U.S.C. § 230(b)(1)(emphasis added).

¹⁷ 47 U.S.C. § 706(a)(emphasis added).

¹⁸ Cingular Comments at 2.

to consumers. And some providers may be driven from the market, decreasing competition.”¹⁹

However, these arguments fail to establish that the non-economic consumer protections discussed by the Commission in this proceeding are not necessary.

Many commenters also argued how easy it is for consumers to switch among providers of broadband Internet access service provider as a reason why non-economic consumer protections are not necessary.²⁰ However, in many cases, it is not so easy for consumers to “simply switch to competing providers,” as these commenters asserted. Many broadband services are available only through long-term contracts. Some consumers have relied on certain features, such as a particular e-mail address, and equipment, such as modems and routers, that are not easy to switch. Moreover, in cases in which fraud and abuse has occurred, the consumer’s switch to a new provider gives the offending provider insufficient reason to take corrective action and prevent additional consumers from being defrauded and abused. Effective enforcement mechanisms, including civil monetary penalties, are needed to stop the fraud and abuse. That is true even in the most competitive of markets.

Finally, Verizon further argued that “regulation of any kind is unnecessary to protect sophisticated ISP customers.”²¹ In making that argument, however, Verizon fails to recognize the vulnerabilities of the casual or unsophisticated customers of broadband Internet access service providers, which, NASUCA submits, represents the vast majority of broadband Internet access users in this still relatively new world of broadband.

¹⁹ Id. at 6; *see also*, NCTA Comments at 11, 13; Time Warner Comments at 2, 5; OPASTCO Comments at 3; Verizon Comments at 5.

²⁰ USTA Comments at 4, 6; Verizon Comments at 3, 16; TIA Comments at 2.

²¹ Verizon Comments at 8, 17.

The Commission should reject arguments that “the market” or “competition” will provide the necessary consumer protections in the broadband era. NASUCA has presented evidence that “the market” and “competition” are not sufficient to provide necessary protections. NASUCA has also demonstrated above that arguments to the contrary are without merit and should be rejected.

B. The Commission Should Maximize the Use of Both Federal and State Law and Encourage Cooperation to Address Fraud, Abuse, and Other Consumer Problems in the Broadband Era.

In its comments, NASUCA stated that the Commission should not preempt the states in their provision of consumer protections in the broadband era.²² NASUCA supports both active Commission involvement in preventing fraud and abuse in broadband Internet access services and the Commission’s acknowledgment of the important role played by the states in ensuring that consumer protection goals are met.²³ Many commenters also supported a coordinated effort among the Commission and state agencies in ensuring consumer protections in the broadband era. For example, NCTA recognized in its comments the benefit of the application of state consumer protection laws to providers of broadband Internet access service.²⁴ However, some commenters argued that the Commission should preempt state action as it pertains to certain consumer protection issues in the broadband era. The Commission should not preempt such state consumer protections.

Some comments are inconsistent in their arguments regarding preemption. Commenters at times cited state regulation as a reason to avoid federal oversight, while, at other times, also

²² NASUCA Comments at 42-46.

²³ Id. at 42; *citing*, NPRM at ¶ 158.

²⁴ NCTA Comments at 11.

seek to broadly preempt the same state regulations. For example, when discussing the implementation of Truth-in-Billing protections as part of this proceeding, AT&T argued in its comments that “state attorneys general provide another check on the billing practices of broadband Internet access providers.”²⁵ However, in response to the Commission’s request for comments regarding preemption, AT&T argued that any non-economic consumer protections imposed by the Commission as part of this proceeding should be “established as part of a *federal* regulatory framework.”²⁶

Similarly, BellSouth argued that state “statutes allow for state action for their enforcement typically through an office of consumer protection or through the state attorney general.”²⁷ BellSouth also relied on state consumer protection laws for the protection of consumers’ private information.²⁸ However, in response to the Commission’s request for comments specifically regarding preemption, BellSouth later argued that “preemption will eliminate the unnecessary hardships that carriers face in having to comply with both national and local rules governing this area.”²⁹

²⁵ AT&T Comments at 9-10.

²⁶ Id. at 22 (emphasis in original). *See also*, Cingular Comments at 16, 18. There, Cingular argued that “the Commission can and should exempt particular offerings, such as broadband Internet access, which are interstate in nature, from state regulation.” Id. at 16. However, later in its comments, Cingular also provides that “to the extent states have laws or regulations of general applicability – *i.e.*, not specifically applicable to Internet access or broadband service – to govern contracts and provide consumer protection, there is no need for such laws or regulations to be preempted.” Id. at 18. *See also*, CTIA Comments at 6. CTIA argued that “exclusive federal regulation makes the most economic sense.” Id. However, CTIA also argued that “a balkanized regulatory framework increases the costs of deploying new and innovative services and can hinder consumers’ access to the benefits of technical advancements.” Id. *See also*, NCTA Comments at 11, 13.

²⁷ BellSouth Comments at 9.

²⁸ Id. at 16-17.

²⁹ Id. at 24.

Likewise, when asserting that the Commission should not ensure new customer proprietary network information (“CPNI”) regulations on broadband Internet access service providers, Verizon stated that “the Commission should not ignore the significant overlay of existing consumer protection law that protects customer information” and references consumer advocates and state attorneys general as examples of such protections.³⁰ Verizon made similar arguments when it responded to the Commission’s request for comments specifically regarding Truth-in-Billing rules.³¹ However, elsewhere in its comments, Verizon argued “the Commission should explicitly preempt state regulation of Title I broadband services and facilities.”³² Verizon argued that “any attempt by states to impose such regulations on broadband services and facilities would run directly counter to the Commission’s considered policy determination favoring a deregulatory approach, and would thus be preempted and invalid.”³³ The carriers cannot have it both ways.

Other parties simply asserted that the Commission should preempt the states in this area. For example, Comcast urged the Commission to “ensure that any regulation of the Internet it adopts be enforced by the Commission or, at a minimum, that every delegation of enforcement authority be closely supervised by the Commission.”³⁴ Likewise, USTA argued that any

³⁰ Verizon Comments at 12.

³¹ Id. at 16.

³² Id. at 25-29.

³³ Id. at 26.

³⁴ Comcast Comments at 17.

consumer protection regulations that may be adopted should be federal regulations and not state regulations.³⁵

NASUCA showed where state involvement has created vital consumer protections. This is particularly true in the areas of slamming and cramming and service quality.³⁶ Likewise, the correct approach to counteract fraud, abuse and other consumer problems is to maximize the use of both federal and state law, to encourage the commitment of needed resources at both federal and state levels, and to encourage maximum cooperation between state and federal authorities. This particularly true given that the FCC does not take action against individual complaints but may decide to take action if a pattern of abuse is detected.

Preemption of state-specific consumer protections is anti-consumer and not sound policy. In fact, broadband Internet access service providers should view the vigorous enforcement of consumer protection laws by states and federal officials in their industry as a benefit and not a burden. Such enforcement efforts help drive the “bad actors” that taint the industry image from the market and make a better climate for legitimate participants such as themselves in which to sell their products and services. The Commission should reject arguments that promote preemption.

C. The Commission Should Ensure That Providers of Voice Services over the Broadband Network Adhere to the Existing Slamming Regulations and That All Providers of Broadband Services Maintain Appropriate Verifications.

NASUCA noted in its initial comments that, as more voice traffic is carried over broadband networks, voice customers on the broadband network need and deserve the same protection against slamming as that afforded to traditional voice customers who make calls

³⁵ USTA Comments at 7.

³⁶ NASUCA Comments at 42-45.

solely over the public switched telephone network.³⁷ Most commenters asserted that the likelihood of slamming for broadband Internet access service is remote.³⁸ To the extent such is the case, these commenters should not object to the Commission adopting a policy that slamming is an objectionable practice in any and all broadband contexts. As a result, the Commission should ensure that providers of voice services over the broadband network adhere to the existing slamming regulations and that all providers of broadband services maintain appropriate verifications.

D. The Commission Should Take Proactive Steps to Prevent Cramming, Fraud and Abuse, with Strong Specific Regulations.

NASUCA showed in its initial comments there is no reason to conclude that broadband service is immune from the fraudulent and abusive practices that have been prevalent in the telecommunications industry.³⁹ NASUCA has also provided evidence of troubling patterns of practice in the broadband Internet access industry, which the Commission must address in any form of consumer protection rules it adopts.⁴⁰ For example, broadband Internet access service providers all too often market promises of “unlimited usage” or “blazing fast speeds” that are not always accurate, or are not routinely available during peak usage. Providers also often make promises of prompt response to disruptions or other network failures in marketing, though in practice they are notoriously slow to fix service problems. As a result, NASUCA demonstrated that the Commission should adopt strong anti-cramming and deceptive advertising rules for

³⁷ Id. at 31.

³⁸ See e.g., AT&T Comments at 8; BellSouth Comments at 12; Comcast Comments at 15; NCTA Comments at 14; TIA Comments at 3; Time Warner Comments at 8-9; Verizon Comments at 14-15.

³⁹ NASUCA Comments at 32-33.

⁴⁰ Id. at 33-34.

broadband Internet access service providers that go beyond the Commission’s Truth-in-Billing rules in order to ensure reasonable consumer protection in the broadband era.⁴¹

Some commenters, however, failed to recognize the importance of such consumer protections. For example, Verizon argued in its initial comments that “negotiation is at the heart of private carriage” and that “companies in the broadband sector should be free to negotiate terms, including special provisions addressing the issues in this NPRM, without government interference and with the imposition of one-size-fits-all solutions.”⁴² This argument is not reflective of the reality of the usage of broadband service by the vast majority of consumers. While there may be a few large enterprise organizations that “negotiate” their broadband Internet access service with providers, the vast majority of broadband consumers cannot do so. Similarly, it is unrealistic to expect that consumers could negotiate the type of consumer protections that the Commission is addressing in this proceeding.

More importantly, a consumer should not *have to* negotiate with a broadband Internet access service provider in order to receive clearly understandable bills from the provider. Nor should the customer have to negotiate an agreement that the broadband Internet access service provider will not supply and charge for unrequested or materially misrepresented services. Carriers like Verizon *do not* want to have to negotiate with all of their millions of broadband consumers every time they subscribe to a service; similarly, consumers should not have to negotiate with each and every carrier.

Other commenters argued in their initial comments that there is no need to ensure Truth-in-Billing consumer protections for broadband Internet access service providers because there is

⁴¹ Id. at 34.

⁴² Verizon Comments at 2.

no evidence that rules are needed. For example, Time Warner argued “the Commission should no more entertain the notion of regulating bills for broadband Internet access than it should for any on-line content.”⁴³ Time Warner added “there is no demonstrated problem regarding the accuracy of customer bills.”⁴⁴ These arguments are without merit and should be rejected. It is not reasonable to compare consumer bills for broadband services to on-line content. On-line content is speech that is generally protected by the First Amendment. Consumer bills, even those provided on-line, are subject to the Commission’s Truth-in-Billing regulations that have been established in response to numerous complaints across the industry regarding bills and the addition of numerous unwanted charges that have been crammed on to such bills.

BellSouth argued that Truth-in-Billing concerns “are not applicable in the broadband market.”⁴⁵ BellSouth argued that Truth-in-Billing rules were required when “there was a proliferation of carriers entering markets while other carriers were expanding into new markets,” such as with dial-around services.⁴⁶ Apparently, BellSouth fails to appreciate that, in many respects, the current broadband Internet access market is similar to the dial-around market. Initially, the dial-around market was replete with fraudulent and abusive practices. Therefore, Truth-in-Billing rules are just as important in the broadband Internet access market today as they were in the dial-around market a decade ago. BellSouth’s argument also fails to recognize that there are new providers of services over the broadband network entering the market now which indicates the need for these consumer protections today.

⁴³ Time Warner Comments at 9.

⁴⁴ Id. at 10. *See also*, Comcast Comments at 15; NCTA Comments at 13. Comcast again relies on “competition” to provide the necessary incentive to address and consumers’ billing issues. Comcast Comments at 15.

⁴⁵ BellSouth Comments at 18.

⁴⁶ Id. at 19.

Finally, OPASTCO argued that imposing Truth-in-Billing rules on the provision of broadband Internet access services by rural incumbent local exchange carriers (“ILECs”) may require them to modify their bills that would divert resources away from the provision of advanced services to rural customers.⁴⁷ This argument is also without merit. Broadband Internet access service providers could reap *additional* resources by ensuring vital consumer protections in the broadband era. Such protections will encourage consumers to subscribe to broadband services and increase their levels of usage. Without clear and understandable bills, for example, many consumers may be less likely to subscribe to broadband services, or to a particular provider. Therefore, OPASTCO’s argument is backward. Truth-in-Billing rules will not drain resources from broadband Internet access service providers. Such rules will instead likely increase those resources by increasing subscribership.

The Commission should take proactive steps to prevent cramming, fraud and abuse, with strong specific regulations, in the broadband era. Opposing comments should be rejected.

E. It Is a Vital Consumer Protection to Ensure That Consumers Have a Reasonable Expectation of Privacy When Using Services Provided over the Broadband Network.

NAUSCA demonstrated in its initial comments that broadband Internet access service providers collect highly sensitive personally identifiable information and that the application of privacy protections is warranted.⁴⁸ NASUCA further demonstrated that the need for non-economic requirements to protect consumer privacy is arguably even more necessary for a customer of a broadband Internet access service provider due to the more extensive and highly sensitive information the provider can gather using more sophisticated tools and software on

⁴⁷ OPASTCO Comments at 5-6.

⁴⁸ NASUCA Comments at 23-30.

broadband networks.⁴⁹ It is clear with the emergence of privacy problems, such as identify-theft and related issues, that consumers' privacy is in greater jeopardy today than ever before. The Commission should not leave vital consumer protections to the uncertain whims of the market or competition. As shown, such a policy will fail. The Commission has once again recognized the importance of protecting consumer information by recently issuing a Notice of Proposed Rulemaking regarding whether additional security measures could prevent the unauthorized disclosure of sensitive customer information held by telecommunications companies.⁵⁰

Some commenters made inconsistent arguments regarding whether the Commission should ensure consumer protection rules regarding privacy for the broadband era. These inconsistencies are similar to the inconsistencies in some commenters' arguments regarding preemption.⁵¹ For example, AT&T argued in its initial comments that CPNI problems do not exist in today's broadband market.⁵² However, AT&T argued, in the alternative, that the FTC or state attorneys general would be better able to handle privacy problems.⁵³ Similarly, BellSouth recognized that "a customer should have knowledge of and consent to a provider's use of information obtained about the customer in the course of providing service to the customer."⁵⁴

⁴⁹ Id. at 24.

⁵⁰ Petition for Rulemaking to Enhance Security and Authentication Standards for Access to Customer Proprietary Network Information, Notice of Proposed Rulemaking, Docket Nos. 06-10 (rel. February 13, 2006).

⁵¹ See, Section II.B., *supra*.

⁵² AT&T Comments at 11.

⁵³ Id. at 12-13.

⁵⁴ BellSouth Comments at 15.

However, BellSouth also argued “use of the information in a competitive market should be a matter left to the provider and its customer, and not subject to Commission-imposed rules.”⁵⁵

NASUCA demonstrated, however, that “the competitive market” has not afforded the necessary privacy protections for customer information and the Commission should now ensure such protections in the broadband era. In addition, the FTC and many state attorneys general do not have jurisdiction over common carriers, including telephone companies.⁵⁶

BellSouth also argued “it would be extremely burdensome for any common carrier to have to apply CPNI rules to information related to telecommunications services and apply a different set of rules to information related to broadband information access service.”⁵⁷ It should be a necessary precedent that a service provider be able to protect consumer information *before* starting to provide such a service, not after. BellSouth’s complaint is actually a basis for applying similar CPNI rules to both broadband Internet access service and traditional telecommunications services, *not* for exempting broadband services from such rules.

Additionally, AT&T argued that the Commission should not implement any such consumer protections for broadband Internet access service providers because “Congress could have extended the CPNI restrictions in the 1996 Act to information obtained from the provision

⁵⁵ Id. See also, Comcast Comments at 14-15; NCTA Comments at 5.

⁵⁶ 45 U.S.C. § 45(a). See e.g., Ohio Rev. Code § 1345.01(A) (which exempts transactions between utilities regulated under O.R.C. § 4905.03 and their customers.)

⁵⁷ BellSouth Comments at 17.

of enhanced services. But Congress chose not to do so.”⁵⁸ However, this argument fails to recognize the increased usage and presence of broadband Internet access services since 1996.⁵⁹ It is undeniable that broadband Internet access services have exploded to unimagined levels over the past decade. Congress could not have anticipated the extreme influence that broadband Internet access services would have today and the great extent to which consumers would rely on such services. In fact, one needs to look no further than the current effort by Congress to “modernize” TA-96 because of the unforeseen advances that have occurred since its enactment a decade ago and Congress’ recognition that new laws must be enacted to deal with those issues.

Finally, other commenters made additional arguments why the Commission should not ensure privacy consumer protections for broadband Internet access service providers. For example, Verizon argued “there is no precedent for the Commission to impose CPNI regulations on information services such as Internet access services.”⁶⁰ Verizon argued that “careful” and “reputable Internet businesses of all kinds, including Verizon” recognize the need to keep customer information private.⁶¹ These additional arguments are without merit and should be rejected.

Verizon’s arguments fail to consider those broadband Internet access service providers who are not “careful” or “reputable” and may not keep customer information private. While those providers may represent a small minority of the industry, nonetheless, those companies exist and consumers fall prey to their careless and non-reputable tactics. This may be even more

⁵⁸ AT&T Comments at 11.

⁵⁹ Even BellSouth noted in its comments that “consider that the Telecommunications Act of 1996 hardly makes reference to the term ‘Internet’.” BellSouth Comments at 1.

⁶⁰ Verizon Comments at 10. *See also*, OPASTCO Comments at 4; Time Warner Comments at 8.

⁶¹ *Id.* at 10-11.

true in competitive markets as companies try to gain market share. Verizon argued “the Commission should take special care not to impose new restrictions on the use of CPNI that would interfere with successful collaboration.”⁶² NASUCA does not seek to restrict legitimate business uses of customer information that are allowed under existing laws and regulations. NASUCA does not wish to interfere with legitimate, legal collaboration.

On the other hand, it is a vital consumer protection to ensure that consumers have a reasonable expectation of privacy when using services provided over the broadband network. The Commission should not leave vital consumer protections to the market or competition.

F. Network Outage Reporting Is a Vital Consumer Protection in the Broadband Era to Ensure That Consumers Have Reliable Access to the Broadband Network.

NASUCA demonstrated in its initial comments that network outage reporting is a vital consumer protection in the broadband era and that the Commission should take steps in this proceeding to ensure that consumers have reliable access to the broadband network.⁶³ NASUCA demonstrated that the Commission should apply network outage reporting requirements to *any and all* forms of two-way communications widely used by consumers, including broadband Internet access service.⁶⁴ This protection becomes even more vital as voice traffic transmitted by broadband Internet access service providers increases. Many commenters argued that the Commission should not extend its network outage reporting requirements to broadband Internet access service providers.⁶⁵

⁶² Id. at 13.

⁶³ NASUCA Comments at 36-42.

⁶⁴ Id. at 37 (emphasis in original).

⁶⁵ See e.g., AT&T Comments at 18-19; see also, Comcast Comments at 16; NCTA Comments at 7-11; Time Warner Comments at 10-11.

Qwest's primary argument in its comments pertained to network outage reporting. Qwest argued "network outage reporting is less relevant in the context of Internet access service than telephony service."⁶⁶ Qwest argued that the better approach would be to rely on market forces and industry efforts, and asked the Commission to "refrain altogether from imposing outage reporting requirements on Internet access service."⁶⁷ Qwest asserted that the burden on a provider like Qwest of any proposed outage reporting for Internet access service is "sweeping" and that the Internet has thrived because it is a "best effort" communication path.⁶⁸ Qwest concluded its comments by arguing "while a 30,000 line/30 minute outage may be a significant outage for the [public switched telephone network], it is not, due to the capacity of the fiber used to access the Internet, a significant Internet access outage."⁶⁹

Additionally, AT&T argued that not imposing network outage reporting requirements as part of this proceeding would be consistent with Congress's directive to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."⁷⁰ However, in addition to the questionable relevancy of Section 230 to the issues in this proceeding, as discussed above, this argument fails to recognize that effective network outage reporting requirements will *help* preserve the vibrant and competitive free market by better guaranteeing consumers that their communications over the broadband network will be more reliable.

⁶⁶ Qwest Comments at 3.

⁶⁷ Id. at 3-4.

⁶⁸ Id. at 6.

⁶⁹ Id. at 9.

⁷⁰ AT&T Comments at 19; *citing*, 47 U.S.C. § 230(b)(2).

NCTA noted that the Commission recently established mandatory outage reporting requirements for wireless providers.⁷¹ NCTA argued that, at the time, the Commission was aware of the role the broadband Internet access played in the national communications infrastructure but chose not to establish any mandatory outage reporting requirements. NCTA argued that the Commission should not choose to implement such requirements at this time either.⁷² NCTA's arguments are not persuasive. Excluding this one *growing* segment of the industry from outage reporting would only encourage arbitrage and attempts to evade network responsibilities.

In contrast to the industry unanimity on other issues, NASUCA notes the diverse group of commenters that *support* network outage reporting requirements as a consumer protection in the broadband era. For example, AT&T argued "the Commission should continue to monitor the marketplace so that it will be in a position to adopt regulations in the future if the need arises."⁷³ AT&T then added "to the extent the Commission finds a market failure, it should act swiftly and decisively to remedy the problem."⁷⁴ BellSouth recognized in its Comments that "in today's environment, outage reporting cannot be taken lightly in any sector of the communications market."⁷⁵ Although TIA had some reservations about various issues pertaining to network outage reporting, TIA was "sympathetic to the Commission's fundamental desire to contribute to

⁷¹ NCTA Comments at 8-9; *citing*, New Part 4 of the Commission's Rules Concerning Disruptions to Communications, Notice of Proposed Rulemaking, 19 FCC Rcd 3373, 3377 (2004).

⁷² *Id.* at 9.

⁷³ AT&T Comments at 6.

⁷⁴ *Id.* at 7.

⁷⁵ BellSouth Comments at 20.

increasing network security and reliability, and its concerns regarding homeland security.”⁷⁶

NASUCA supports these positions from AT&T, BellSouth and TIA.

The Commission must recognize that network outage reporting is a vital consumer protection in the broadband era and ensure that consumers have reliable access to the broadband network. The Commission should reject arguments from commenters who assert that this vital consumer protection is not necessary.

G. The Commission Should Ensure Uniform Discontinuance Procedures to Ensure That Consumers Are Not Harmed by Inappropriate Disconnections.

NASUCA did not file any initial comments regarding whether the Commission should apply Section 214 discontinuance notice requirements on broadband Internet access service providers as a non-economic consumer protection in the broadband era. However, NASUCA notes in these Reply Comments the substantial and diverse support from many commenters in favor of this concept. For example, AT&T stated “market forces alone may not be sufficient to fully protect consumers from potential disruptions in service” and that the Commission may want “to establish a streamline discontinuance procedure for providers of broadband Internet access service.”⁷⁷

Importantly, many commenters supported some type of discontinuance procedures for broadband Internet access service providers. AT&T noted that “service providers that decide to discontinue service to their customers and exit the marketplace usually have few incentives to meet their customers’ needs” and may be “more concerned with minimizing expenses and preserving its remaining assets than working cooperatively with other service providers to ensure

⁷⁶ TIA Comments at 4.

⁷⁷ AT&T Comments at 2.

a smooth transition for its customers.”⁷⁸ The Commission must recognize as well the circumstances behind what such discontinuance protections are beneficial to consumers. For example, a broadband Internet access service provider would likely hastily discontinue services in the event of a bankruptcy or other difficulty in providing the requested service.

However, other commenters argued that Section 214-type notification requirements do not appear to be warranted at this time.⁷⁹ For example, Time Warner argued “customers of a discontinuing provider almost invariably may purchase service from an alternative broadband service provider, and imposing exit barriers in such a marketplace does little more than pointlessly introduce inefficiencies.”⁸⁰ Time Warner overly simplifies this matter. NASUCA showed in its initial comments, and above, that switching from one broadband Internet access service provider to another faces substantial barriers. Therefore, consumers cannot easily purchase service from other broadband Internet access service providers as Time Warner asserts.

Additionally, in arguing that the Commission should not ensure Section 214 discontinuance protections on broadband Internet access service providers, Verizon again relied upon “the competitive environment for broadband Internet access services.”⁸¹ Verizon also argued “companies need freedom to discontinue offerings that have become obsolete (due to changes in technology) or for which there is decreasing demand.”⁸² NASUCA is not interested in requiring broadband Internet access service providers to continue to provide offerings that

⁷⁸ Id. at 20-21.

⁷⁹ BellSouth Comments at 23; NCTA Comments at 14; OPASTCO Comments at 7; Comcast Comments at 16; Time Warner Comments at 12; Verizon Comments at 20.

⁸⁰ Time Warner Comments at 12.

⁸¹ Verizon Comments at 20.

⁸² Id. at 23.

have become obsolete or for which there is decreasing demand. Such providers should have an opportunity to discontinue such services in an appropriate way.

The Commission must be aware, however, that the nature of the broadband Internet access service industry creates the real possibility that providers may discontinue providing service in ways harmful to consumers. There may be instances where the broadband Internet access service provider provides consumers no notice of such a discontinuation. This is a problem particularly where consumers rely on broadband Internet access services as the sole source of voice communications, including emergency services. In that increasingly popular instance, a service provider who suddenly discontinues service may leave a consumer without any ability to place outgoing calls, including a call to emergency services. It is also a problem where consumers have paid deposits or made advance payments that they cannot recoup from a suddenly-disappeared company.

The Commission should recognize these, and many other, very real instances where discontinuance protections are a vital consumer benefit in the broadband era. The Commission should not accept the industry's repeated arguments that "the market" or "competition" will provide the necessary consumer protections. In fact, it is because of these effects that the discontinuance procedures are necessary. As a result, it is a vital consumer protection in the broadband era that the Commission ensure uniform discontinuance procedures to ensure that consumers are not harmed by inappropriate disconnections.

H. Requiring Non-Discriminatory Standards over the Broadband Network So That Broadband Networks Remain Open and Continue to Offer Great Public and Economic Benefit Is an Essential Consumer Protection That Must Be Assured in the Broadband Industry.

NASUCA demonstrated in its initial comments that non-discriminatory standards pertaining to the broadband networks represent a vital consumer protection.⁸³ Such non-discrimination is the very foundation from which many of the Internet's great benefits result. Recently, however, these principles of non-discrimination standards have been put in jeopardy. NASUCA provided such examples in its initial comments.⁸⁴ Additional examples of such potential discrimination have also recently surfaced. For example, at a conference regarding the tenth anniversary of TA-96, a Verizon representative cast further doubt on other Internet service providers' ability to use Verizon's broadband networks to provide a multitude of services in the future when he stated

The network builders are spending a fortune constructing and maintaining the networks that Google intends to ride on with nothing but cheap servers. It is enjoying a free lunch that should, by any rational account, be the lunch of the facilities providers.⁸⁵

Fortunately, many commenters in the instant proceeding have recognized the need for all providers of broadband Internet access service to be treated equally. The Commission should recognize these comments, and the diversity of the commenters, and ensure that the consumer protections considered in this proceeding are applied equally to all broadband Internet access service providers.

⁸³ NASUCA Comments at 8-17.

⁸⁴ Id. at 8-9.

⁸⁵ Mohammed, Arshad, "Verizon Executive Calls for End to Google's 'Free Lunch'," The Washington Post, February 7, 2006, D1.

Pac-West's only issue in its comments pertained to net neutrality issues. Pac-West "urges the Commission to establish protections in this proceeding to ensure that ILECs do not harm consumers by discriminating against competitors in the provision of ILEC-controlled last mile Internet access broadband or dial-up connections to end users or to ILEC-controlled IP broadband backbone facilities."⁸⁶ Pac-West mentioned various forms of non-price discrimination, such as "providing other competitors problematic or otherwise inferior circuits, and providing priority routing to themselves."⁸⁷ Pac-West warned of the "likelihood of anticompetitive behavior by the ILECs that could harm consumers."⁸⁸ As demonstrated by the evidence provided by NASUCA in its initial comments, and above, these forms of non-price discrimination are very real.

CTIA "urges the Commission to develop a regulatory national framework for regulating broadband Internet access services regardless of the technology used."⁸⁹ Even Verizon stated in its initial comments that "if the Commission were to regulate these competitive broadband services, it must do so evenhandedly."⁹⁰ Verizon added that "the Commission should take care not to re-introduce any disparate regulation between competing providers in the broadband sphere."⁹¹ NASUCA supports such competitively neutral efforts.

As a result, requiring non-discriminatory standards over the broadband network so that broadband networks remain open and continue to offer great public and economic benefit is an

⁸⁶ Pac-West Comments at 2.

⁸⁷ *Id.* at 4.

⁸⁸ *Id.* at 5.

⁸⁹ CTIA Comments at 1, 12. *See, also*, AT&T Comments at 13; BellSouth Comments at 5, 20; Comcast Comments at 14; NCTA Comments at 6; USTA Comments at 7.

⁹⁰ Verizon Comments at 29-30.

⁹¹ *Id.* at 29.

essential consumer protection in the broadband industry. The Commission should recognize the diversity of commenters who agree that the consumer protections discussed in this proceeding should be applied equally to all broadband Internet access service providers.

I. The Commission Has the Authority to Use Its Ancillary Jurisdiction to Ensure the Non-Economic Consumer Protections That Are Discussed in the NPRM.

Some commenters argued that the Commission cannot exercise its authority under Title I of TA-96 to ensure the non-economic consumer protections that are discussed in this proceeding. For example, Cingular argued “no provision of the Act purports to grant the Commission specific authority to regulate communications other than common carrier communications, or the use to which such communications are put, such as the provision of Internet access or information services that are provided via such communications.”⁹² Comcast also argued “as an initial matter, the Commission’s Title I authority is not necessarily as expansive as the Notice appears to assume.”⁹³

NASUCA agrees with commenters such as Pac-West that “Title II provides the best framework for addressing ILEC control of last mile broadband as well as narrow-band connection to end users.”⁹⁴ Since the Commission has determined that it would ensure these consumer protections under its Title I authority, however, NASUCA submits that the Commission is well within its statutory authority to do so.

⁹² Cingular Comments at 4 (citations omitted). *See also*, NCTA Comments at 3; Time Warner Comments at 13.

⁹³ Comcast Comments at 2. Comcast argued that the Commission provides no analysis as to why the regulations it proposes are reasonably ancillary to the performance of the Commission’s statutorily mandated responsibilities. *Id.*; *see also*, Comcast Comments at 9-11. As shown here, this is irrelevant.

⁹⁴ Pac-West Comments at 1-2.

The Commission noted in the NPRM that its authority under Title I dates back to its Computer I rules.⁹⁵ There, the Commission required facilities-based common carriers to provide the basic transmission services underlying their enhanced services on a nondiscriminatory basis pursuant to tariffs regulated by Title II of the Act.⁹⁶ The Commission has also noted the determination by the United States Supreme Court in the recent Brand X decision stating that the Commission “remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction.”⁹⁷ The Commission has also noted that it has exercised its ancillary jurisdiction under Title I to extend accessibility obligations that mirror those under Section 255 to certain information services such as voicemail and interactive menu service.⁹⁸

The Commission further stated that it “may exercise its ancillary jurisdiction when Title I of the Act gives the Commission subject matter jurisdiction over the service to be regulated and the assertion of jurisdiction is ‘reasonably ancillary to the effective performance of [its] various responsibilities.’”⁹⁹ The Commission recognized that the Supreme Court upheld regulations applied to cable television shows under the Commission’s ancillary jurisdiction at a time before the Commission had an express congressional grant of regulatory authority over that medium.¹⁰⁰ In light of the substantial legal precedent, the Commission then determined that it has subject matter jurisdiction over providers of broadband Internet access services because these services

⁹⁵ NPRM at ¶ 23 (citations omitted); *see also*, *id.* at ¶ 108.

⁹⁶ *Id.* at ¶ 23 (citations omitted).

⁹⁷ *Id.* at n.63; *citing*, National Cable & Telecommunications Ass’n v. Brand X Internet Services, 125 S.Ct. 2688 (2005); *see also*, NPRM at ¶ 108.

⁹⁸ *Id.* at ¶¶ 108, 121.

⁹⁹ *Id.* at ¶ 109.

¹⁰⁰ *Id.*; *citing*, United States v. Southwestern Cable Co., 392 U.S. 157, 177-78 (1968); *see also*, United States v. Midwest Video Corp., 406 U.S. 649 (1972).

are unquestionably wire communication as defined in Section 3(52) and 3(33) of TA-96.¹⁰¹ The Commission also found that “regulations would be ‘reasonably ancillary’ to the Commission’s responsibility to implement sections 222, 255 and 258, among other provisions of the Act.”¹⁰²

As a result, the Commission has clearly articulated its ability to address the consumer protection issues raised in the NPRM pursuant to its Title I ancillary jurisdiction. The commenters who have questioned the Commission’s ancillary jurisdiction have not refuted the Commission’s determination and the long-standing history of Title I authority. NASUCA supports this part of the Commission’s legal analysis that lays to rest any concerns regarding whether the Commission has the legal authority to implement the vital consumer protections discussed in the NPRM. Commenters arguments to the contrary are without merit and should be rejected.

J. Universal Service Funding Obligations Should Be Required of All Broadband Service Providers.

NASUCA demonstrated in its initial comments that universal service funding obligations should be required of all broadband Internet access service providers.¹⁰³ In furtherance of its public interest mandate and as a part of its statutory obligation to promote and advance universal service, the Commission should recognize that broadband Internet access service providers offering voice services and other telecommunications-like services have an obligation to contribute to universal service and specifically to the federal universal service fund.¹⁰⁴ The

¹⁰¹ NPRM at ¶ 110; *citing*, 47 U.S.C. §§ 153(33) and 153(52).

¹⁰² *Id.*

¹⁰³ NASUCA Comments at 17-23.

¹⁰⁴ *Id.* at 17.

Commission should not waiver in its support of universal service and should require these service providers to contribute to universal service.

NASUCA notes industry recognition of the need to consider support for universal service as part of this proceeding. In particular, CTIA posited “the Commission should rethink how universal service is best achieved in the emerging multi-dimensional communications marketplace characterized by inter-modal competition and convergence.”¹⁰⁵ The Commission should consider this recognition by CTIA when addressing the application of universal service principles as a vital consumer protection in the broadband era in this proceeding as NASUCA has demonstrated in its initial comments. As such, the Commission should require broadband Internet access service providers to contribute to universal service for the good not only of the broadband network, but also for the multitude of applications provided over that network.

III. CONCLUSION

NASUCA applauds the Commission’s commitments to adopt non-economic regulations that are necessary to ensure consumer protection in the broadband era and the use of swift and vigorous enforcement action when necessary. Such consumer protections include those articulated by the FCC in the NPRM as well the additional issues of open access and universal service that NASUCA raised in its initial comments.

¹⁰⁵ CTIA Comments at 12.

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