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

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 Requirements	)	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

REPLY COMMENTS OF THE STATE OF HAWAII

John E. Cole
Executive Director
Department of Commerce
and Consumer Affairs
STATE OF HAWAII
250 South King Street
Honolulu, Hawaii 96813

Bruce A. Olcott
Herbert E. Marks
Squire, Sanders & Dempsey, L.L.P.
1201 Pennsylvania Avenue, N.W.
P.O. Box 407
Washington, D.C. 20044
(202) 626-6600

March 1, 2006

SUMMARY

The Commission should extend the statutory rate integration and geographic averaging requirements of Section 254(g) to broadband Internet access services to ensure that these important consumer protection measures continue to benefit the public. The Commission has repeatedly reaffirmed the importance of rate integration and geographic averaging. Furthermore, Congress intended for rate integration and geographic averaging to be enforced regardless of the level of competition that exists in the telecommunications industry and regardless of the technologies that are employed by carriers to provide long distance services to consumers.

Both Congress and the Commission considered and rejected the possibility that the Section 254(g) requirements could distort the market. For example, the Commission has repeatedly rejected arguments that the Section 254(g) requirements may place competitive pressure on nationwide carriers to refrain from providing service to rural and high cost areas. Furthermore, Section 254(g) is not in conflict with the universal service requirements of Section 254(e) of the Communications Act. Both sections serve important and distinct functions. Although Section 254(e) prohibits the use of implicit funding for universal service, Section 254(g) requires implicit averaging in long distance communications services.

The Commission clearly has statutory authority to impose rate integration and geographic averaging requirements on broadband Internet access services. The Commission concluded in the *NPRM* that each of the predicates for ancillary jurisdiction "are likely satisfied for any *consumer protection*, network reliability, or national security obligation that we may subsequently decide to impose on wireline broadband Internet access service providers." This ancillary authority is not circumscribed by Section 254(e) or any other provision of the Communications Act.

Finally, a compelling need exists to impose rate integration and geographic averaging requirements on providers of broadband Internet access services. Broadband Internet access services are increasingly being used to offer consumers long distance voice and data communications services that serve as an effective replacement for narrowband interexchange telecommunications services. Because of this trend, it would seriously undermine the underlying public interest benefits of Section 254(g) if carriers could evade their historical rate integration and geographic averaging requirements by employing broadband technologies. It is therefore critically important for the Commission to continue to promote the public interest and the will of Congress by requiring providers of broadband Internet access services to comply with the underlying policies that were codified in Section 254(g) of the Communications Act.

TABLE OF CONTENTS

I. CONGRESS CONCLUDED THAT SECTION 254(g) IS NECESSARY TO PROTECT CONSUMERS EVEN IN A COMPETITIVE MARKET 2

II. CONGRESS AND THE COMMISSION CONCLUDED THAT THE POTENTIAL FOR ECONOMIC DISTORTION RESULTING FROM SECTION 254(g) WAS MINIMAL AND OUTWEIGHED BY ITS PUBLIC INTEREST BENEFITS 4

III. IN ADOPTING SECTION 254(g), CONGRESS MANDATED IMPLICIT AVERAGING REQUIREMENTS THAT ARE COMPLEMENTARY TO AND NOT IN CONFLICT WITH SECTION 254(e) 5

IV. ALTHOUGH CONGRESS AUTHORIZED A LIMITED EXCEPTION TO SECTION 254(g) FOR PRIVATE LINE SERVICES, CONGRESS INTENDED FOR THE EXCEPTION TO REMAIN LIMITED 6

V. THE COMMISSION HAS PREVIOUSLY CONCLUDED THAT CMRS CARRIERS SHOULD BE SUBJECT TO SECTION 254(g) 7

VI. SECTION 254(g) IS A CONSUMER PROTECTION MEASURE, NOT ECONOMIC RATE REGULATION 8

VII. THE COMMISSION HAS STATUTORY AUTHORITY TO APPLY THE UNDERLYING POLICIES OF SECTION 254(g) TO BROADBAND INTERNET ACCESS SERVICES 9

VIII. A COMPELLING NEED EXISTS TO APPLY THE UNDERLYING POLICIES OF SECTION 254(g) TO BROADBAND INTERNET ACCESS SERVICES 11

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

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 Requirements	)	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

REPLY COMMENTS OF THE STATE OF HAWAII

The State of Hawaii (the "State"), by its attorneys and pursuant to section 1.415 of the Commission's rules, 47 C.F.R. § 1.415, hereby replies to comments that were filed in the above captioned proceeding.[1] The State replies herein solely with respect to comments that were filed

[1] These Comments are submitted by the State of Hawaii acting through its Department of Commerce and Consumer Affairs.

addressing the Commission's application of rate integration and geographic averaging policies to broadband Internet access services.

The Commission has repeatedly reaffirmed the importance of the rate integration and geographic averaging requirements that were codified in Section 254(g) of the Communications Act.[2] Nevertheless, most of the parties that filed comments opposing the application of Section 254(g) to broadband Internet access services raised arguments that challenged the underlying basis for Section 254(g), rather than whether rate integration and geographic averaging should be applied to broadband Internet access services. As explained below, most of the arguments raised by commenters were previously addressed by Congress and the Commission. Reexamination of these issues is not needed in this proceeding. Furthermore, as explained in subsequent sections of these reply comments, a compelling need exists for the Commission to carry out the will of Congress by imposing rate integration and geographic averaging requirements on broadband Internet access services.

I. CONGRESS CONCLUDED THAT SECTION 254(g) IS NECESSARY TO PROTECT CONSUMERS EVEN IN A COMPETITIVE MARKET

Several of the parties that filed comments in this proceeding argued that enforcement of the rate integration and geographic requirements of Section 254(g) are unnecessary because the market for broadband Internet access services is competitive.[3] When Congress codified the

---

[2] *See, e.g., NPRM*, ¶ 157. Section 254(g) of the Communications Act includes two independent requirements. First, Section 254(g) directs the Commission to mandate geographic rate averaging by requiring interexchange carriers to charge rates in rural areas that are no higher than the rates they charge in urban areas. *See* 47 U.S.C. § 254(g); *see also* 47 C.F.R. § 64.1801(a) (1999). Second, Section 254(g) directs the Commission to enforce rate integration by adopting rules that require interexchange carriers to provide services to their subscribers in each state at rates no higher than the rates charged to their subscribers in any other state. 47 U.S.C. § 254(g); *see also* 47 C.F.R. § 64.1801(b) (1999).

[3] *See Verizon Comments* at 24; *US Telecom Comments* at 6; *NCTA Comments* at 15.

Section 254(g) requirements in 1996, however, the market for long distance telecommunications services was arguably far more competitive than the market is today for broadband wireline services. In fact, a major component of the 1996 legislation was establishing the terms for entry by local exchange carriers into the domestic long distance market.

Irregardless of the level of competition that currently exists for broadband Internet access services, however, the Commission has recognized that Congress deemed Section 254(g) to be necessary regardless of the growth in competition in the telecommunications industry.[4] In fact, Congress apparently concluded that, as competition continued to grow for telecommunications services, the need for Section 254(g) would *increase*, rather than diminish. The Senate Commerce Committee explained:

> The Committee intends this provision to ensure that *competition* in telecommunications services does not come at the cost of higher rates for consumers in rural and remote areas."[5]

The advent of a competitive market for broadband Internet access services therefore does not diminish Congress' goal of protecting the needs of consumers in rural and remote areas of the country.

---

[4] *See Policies and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934 as Amended*, 11 FCC Rcd 9564, 9583 (1996) ("*Section 254(g) Implementation Order*") (observing that "Congress knew at the time the 1996 Act was passed that all interexchange carriers were nondominant and we find that Congress would not have required us to adopt rules to implement geographic rate averaging if it had intended us to abandon this policy with respect to all interexchange carriers so soon after enactment").

[5] S.R. Rep. No. 23, 104th Cong., 1st Sess. 30 (1995) (*emphasis added*).

II. CONGRESS AND THE COMMISSION CONCLUDED THAT THE POTENTIAL FOR ECONOMIC DISTORTION RESULTING FROM SECTION 254(g) WAS MINIMAL AND OUTWEIGHED BY ITS PUBLIC INTEREST BENEFITS

Other commenters in this proceeding argued that the Commission's enforcement of Section 254(g) on broadband Internet access services could distort competition; preventing promotions and price reductions in some markets,[6] and creating a disincentive for carriers to provide broadband Internet access services to high cost areas.[7]

Both Congress and the Commission have repeatedly considered the potential economic impacts of maintaining rate integration and geographic averaging requirements. In addressing this issue, Congress reached the same conclusion that the Commission had reached when it first adopted its rate averaging policies in the 1970s – the substantial public interest benefits that result from Section 254(g) clearly outweigh any potential for economic distortion. As the Senate Commerce Committee explained:

> Maintaining affordable long distance service in high cost remote areas as well as in lower cost metropolitan areas benefits society as a whole by fostering a nationwide economic marketplace.[8]

The Commission has repeatedly concurred in this position, reaffirmed the importance of Section 254(g) and discounting the possibility that rate integration and geographic averaging

---

[6] *See Time Warner Comments* at 12; *Verizon Comments* at 23; *Comcast Comments* at 17. Contrary to Time Warner's suggestion, the Commission already maintains an exception to Section 254(g) with respect to temporary promotional offerings. The Commission permits carriers to offer geographically limited promotions as long as they are temporary. *See Section 254(g) Implementation Order* at 9577. The Commission imposed a 90 day limit on temporary promotions and cautioned that it expects that carriers' temporary promotions will not, when viewed over a number of years, reflect a pattern of undue discrimination against rural or high-cost areas. *See id.*

[7] *See BellSouth Comments* at 23.

[8] S.R. Rep. No. 23, 104th Cong., 1st Sess. 30 (1995).

could distort the marketplace for communications services. For example, the Commission has repeatedly rejected arguments that the Section 254(g) requirements may place competitive pressure on nationwide carriers to refrain from providing service to rural and high cost areas.[9] Nationwide carriers enjoy significant economies of scale that are not enjoyed fully by regional carriers. These economies more than offset the additional costs that exist in averaging costs between low cost and high cost areas.

III. IN ADOPTING SECTION 254(g), CONGRESS MANDATED IMPLICIT AVERAGING REQUIREMENTS THAT ARE COMPLEMENTARY TO AND NOT IN CONFLICT WITH SECTION 254(e)

Other commenters in this proceeding argued that the Section 254(g) requirements constitute an implicit subsidy, which, they argued, is in conflict with Section 254(e) of the Communications Act.[10] In making this argument, the parties misinterpreted the clear language of Section 254 by suggesting that the universal service requirements of Section 254(e) and the geographic averaging and rate integration requirements of Section 254(g) involve associated requirements. In reality, the two statutory sections delineate entirely different, although

---

[9] *See In the Matter of Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, et al.*, Second Report and Order and Further Notice of Proposed Rulemaking; Fifteenth Report and Order; and Report and Order, 16 FCC Rcd 19613, 19654 (2001) (stating that the Commission is not persuaded by AT&T's argument that interexchange carriers face significant pressures to geographically deaverage toll rates in the face of competition from regional carriers that originate service in areas with lower access charges); *Interstate, Interexchange Marketplace Implementation of Section 254(g) of the Communications Act of 1934, as amended; AT&T Corp.'s Petition for Waiver and Request for Expedited Consideration*, 12 FCC Rcd 934, 939 (1997) (rejecting AT&T's request for a waiver of the geographic averaging requirement in order to match Bell Atlantic's rates in the New York/New Jersey corridor); *Section 254(g) Implementation Order* at 9582-83 (rejecting arguments that competition from low-cost regional local exchange carriers justifies broad forbearance from the geographic averaging requirements of Section 254(g) for nationwide interexchange carriers).

[10] *See Time Warner Comments* at 13; *BellSouth Comments* at 23-24.

complementary, obligations, each of which was adopted by Congress for specific purposes and with distinct implementation requirements.

Section 254(e) authorizes the provision of funding to "eligible telecommunications carriers" to support the costs of providing universal services to consumers and institutions, while Section 254(g) mandates rate averaging for all interstate or long distance services. Section 254(e) applies solely to eligible telecommunications carriers (excluding long distance carriers), while Section 254(g) applies solely to long distance carriers, which, by their nature, are not eligible to receive universal service support.

Most important, Section 254(e) prohibits the use of implicit mechanisms, while Section 254(g) requires it. Section 254(g) directs the Commission to require carriers to average their rates *because* disparities exist in the cost of providing service in different regions and states, not *in case* of such disparities. Section 254(g) therefore is not in conflict with Section 254(e) and its continued enforcement is justified as long distance telecommunications traffic migrates to a broadband Internet access infrastructure.

IV. ALTHOUGH CONGRESS AUTHORIZED A LIMITED EXCEPTION TO SECTION 254(g) FOR PRIVATE LINE SERVICES, CONGRESS INTENDED FOR THE EXCEPTION TO REMAIN LIMITED

A number of industry opponents highlighted the Commission's previous forbearance from portions of Section 254(g) for private line services.[11] The Commission acknowledged in the *NPRM*, however, that its exception for private line services applied only to the geographic averaging requirements of Section 254(g) and not to the rate integration requirements.[12] Furthermore, Congress directed that the Commission's limited exception for private line services

[11] *See Verizon Comments* at 24; *NCTA Comments* at 15.

[12] *See NPRM at 157 n.467* (*citing Section 254(g) Implementation Order* at 9577).

(which predates Congress' adoption of Section 254(g)) must remain limited. The Joint Conference Committee explained that:

> The conferees are aware that the Commission has permitted interexchange providers to offer non-averaged rates for specific services in limited circumstances (such as services offered under Tariff 12 contracts), and intend that the Commission, where appropriate, could continue to authorize limited exceptions to the general geographic rate averaging policy using the authority provided by new section 10 of the Commissions Act.[13]

Taking Congress' instruction into account, it would be inappropriate for the Commission to extend its limited exception to the geographic averaging portion of Section 254(g) to embrace broadband Internet access services. If industry forecasts regarding the growth of broadband Internet access services prove correct, such a reinterpretation of Section 254(g) would be far from limited and could eviscerate the long standing Commission policies that Section 254(g) was intended to protect.

V. THE COMMISSION HAS PREVIOUSLY CONCLUDED THAT CMRS CARRIERS SHOULD BE SUBJECT TO SECTION 254(g)

The final old issue that was raised by commenters in this proceeding is whether Section 254(g) applies to providers of commercial mobile radio services ("CMRS"). On its face, the issue of CMRS broadband services does not appear to be at issue in this proceeding. Despite this fact, Cingular Wireless coyly observed that "[t]he Commission has previously assessed the appropriate regulatory regime for CMRS rate averaging, and there is no reason to revisit it here with respect to broadband Internet access."[14]

---

[13] H.R. Rep. No. 458, 104th Cong., 2d Sess. 132 (1996).

[14] *See Cingular Comments* at 10.

In reality, the Commission repeatedly concluded that CMRS carriers must comply with Section 254(g), stating that Section 254(g) "on its face *unambiguously* applies to all providers of interstate, interexchange services."[15] Although the Commission's decision was subsequently reversed by the U.S. Court of Appeals, the Court did so after concluding that, although Section 254(g) was not unambiguous in its application to CMRS, the FCC on remand could reasonably interpret Section 254(g) as applicable to CMRS.[16]

The FCC has never addressed the issue on remand. Possibly as a result of the threat of further Commission action, however, the wireless industry has generally adopted uniform nationwide pricing mechanisms for wireless long distance services. As discussed in a subsequent section of these reply comments, however, it is too early to tell whether uniform nationwide pricing will be adequately reflected in the market for broadband Internet access services.

VI. SECTION 254(g) IS A CONSUMER PROTECTION MEASURE, NOT ECONOMIC RATE REGULATION

In addition to restating old arguments, opponents of the Section 254(g) requirements raised certain new arguments in this proceeding. First, a number of commenters challenged the FCC's conclusion that rate integration and geographic averaging qualify as consumer protection measures, arguing instead that Section 254(g) involves a form of economic rate regulation that may be outside the scope of the instant rulemaking proceeding.[17]

---

[15] *See Policy and Rules Concerning the Interstate, Interexchange Marketplace -- Implementation of Section 254(g) of the Communications Act of 1934, as Amended,* 14 FCC Rcd 391, 396 (1998) (*emphasis added*).

[16] *See GTE Services Corp. v. FCC*, 224 F.3d 768 (D.C. Cir. 2000).

[17] *See Time Warner Comments at* 12; *BellSouth Comments* at 23; *Verizon Comments* at 24; *Comcast Comments* at 16; *AT&T Comments* at 15-16; *USTelecom Comments* at 7.

The legislative history of Section 254(g) clearly documents that the underlying purpose of the rate integration and geographic averaging requirements was not to cap rates, but to protect consumers in rural and remote areas from discrimination in their access to affordable long distance communications services. In this regard, Section 254(g) places no limits on the rates imposed by long distance carriers. Section 254(g) simply requires that, whatever rates are imposed by carriers, those rates must be available to all consumers in the United States, regardless of their location. As noted above, Congress codified this requirement because non-discriminatory access to communications services "benefits society as a whole by fostering a nationwide economic marketplace."[18]

Furthermore, economic rate regulation is usually employed by regulatory authorities to simulate competitive pricing conditions in non-competitive industries and markets. In contrast, Congress concluded that the Section 254(g) requirements increased in importance as competition flourished. Therefore, the Commission was correct in concluding that rate integration and geographic averaging constitute consumer protection measures that are appropriately being considered in the instant rulemaking proceeding.

VII. THE COMMISSION HAS STATUTORY AUTHORITY TO APPLY THE UNDERLYING POLICIES OF SECTION 254(g) TO BROADBAND INTERNET ACCESS SERVICES

Another new argument raised by one commenter in this proceeding is that, despite the Commission's clear conclusions in the *NPRM*, the Commission cannot employ its Title I ancillary authority to apply the underlying policies of Section 254(g) to broadband Internet access services.[19]

---

[18] S.R. Rep. No. 23, 104th Cong., 1st Sess. 30 (1995).

[19] *See AT&T Comments* at 14-18.

The Commission concluded in the *NPRM* that each of the predicates for ancillary jurisdiction "are likely satisfied for any *consumer protection*, network reliability, or national security obligation that we may subsequently decide to impose on wireline broadband Internet access service providers."[20] First, the Commission has subject matter jurisdiction over providers of broadband Internet access services.[21] Second, imposing such consumer protection measures as rate integration and geographic averaging requirements would be reasonably ancillary to the Commission's Section 254(g) obligations, along with its duty under Section 151 to make available "a rapid, efficient, *Nation-wide,* and world-wide wire and radio communication service."[22]

AT&T, however, argued that the ancillary authority that is provided to the Commission by Title I of the Act is taken away, at least in part, by Section 254(e). Specifically, although Section 254(g) mandates implicit rate integration and geographic averaging for long distance services, AT&T argued that Section 254(e) of the Act does not permit the use of implicit funding mechanisms for any other types of services.[23] AT&T therefore claimed that the Commission cannot use its ancillary authority to impose rate integration and geographic averaging requirements on wireline broadband Internet access services without running afoul of the Section 254(e) restriction.[24]

---

[20] *NPRM*, ¶ 109 (*emphasis added*).

[21] *See id.*, ¶ 110.

[22] 47 C.F.R. § 151 (*emphasis added*).

[23] *See AT&T Comments* at 16-17.

[24] *See id.*

In reality, Section 254(e) requires that all Federal universal service support that is provided to eligible telecommunications carriers must be explicit.[25] In contrast, the implicit averaging that is mandated by Section 254(g) does not constitute universal service support and is not provided to telecommunications carriers, eligible or otherwise. Instead, rate integration and geographic averaging are Congressionally-mandated requirements that are enjoyed directly by consumers through standardized pricing for long distance services in all regions of the country. Therefore, Section 254(e) places no restrictions on the Commission's ancillary authority to impose rate integration and geographic averaging requirements on wireline broadband Internet access services.

VIII. A COMPELLING NEED EXISTS TO APPLY THE UNDERLYING POLICIES OF SECTION 254(g) TO BROADBAND INTERNET ACCESS SERVICES

The final argument raised by opponents of Section 254(g) is that no demonstrated need exists to "burden" providers of broadband Internet access services with rate integration and geographic averaging requirements.[26] In making this argument, the parties do not appear to challenge the substantial public interest benefits that have been achieved, and can continue to be achieved, by the Section 254(g) policies. The parties, however, appear to argue that wide spread availability and competitive pricing of broadband Internet access services will make rate integration and geographic averaging requirements unnecessary.

At this developmental stage in the growth of the broadband Internet access industry, however, it is too early to tell whether broadband Internet access services will become equally available to all consumers in the United States at competitive prices and terms. At the same

---

[25] 47 U.S.C. § 254(e) (Section 254(e) includes other requirements that are not relevant herein).

[26] *Verizon Comments* at 23; *see also CTIA Comments* at 11; *Comcast Comments* at 17; *Cingular Comments* at 10.

time, broadband Internet access services are increasingly being used to offer consumers long distance voice and data communications services that serve as an effective replacement for narrowband interexchange telecommunications services. Because of this trend, it would seriously undermine the underlying public interest benefits of Section 254(g) if carriers could evade their historical rate integration and geographic averaging requirements by employing broadband technologies.

It is therefore critically important for the Commission to extend the Section 254(g) requirements to broadband Internet access services and continue to preserve the underlying policies and public interest benefits that Section 254(g) was intended to promote. Congress intended for rate integration and geographic averaging to be enforced regardless of the level of competition that exists in the telecommunications industry and regardless of the technologies that are employed by carriers to provide services to consumers. The Commission should therefore promote the public interest by continuing to enforce the intent of Congress and the underlying policies of Section 254(g).

Respectfully submitted,

THE STATE OF HAWAII

By: _____

John E. Cole
Executive Director
Department of Commerce
and Consumer Affairs
STATE OF HAWAII
250 South King Street
Honolulu, Hawaii 96813

Bruce A. Olcott
Herbert E. Marks
Squire, Sanders & Dempsey, L.L.P.
1201 Pennsylvania Avenue, N.W.
P.O. Box 407
Washington, D.C. 20044
(202) 626-6600

March 1, 2006