This comment is in opposition to the inquiry letters from the FCC's Wireline Competition Bureau & Chief Counsel to Comcast dated January 18, 2009 & April 14, 2009, and supports & expands upon Comcast's January 30, 2009 reply letter. (I am mailing a separate copy to Comcast.) I am a consumer who is a customer of Comcast's VoIP service, and have also recently tried MagicJack (referred to later in this comment). I assert that the FCC letters are **improper** and **outside the FCC's jurisdiction** because:

1. The April 14 letter is correct that, at this point, the FCC has not formally determined the regulatory status of most VoIP services; however, this is only because the FCC has not taken any significant action in this field since the Supreme Court's *Brand X* decision. *Brand X* – as written by Justice Thomas, the Court's most tech-savvy member – makes it clear that IP technology itself is the necessary transformation to create an "information service". Thus, any IP-based service, except probably a service substantially identical to that in the *IP-in-the-Middle Order* (i.e., IP transport of an end-to-end PSTN signal with no net protocol conversion) which is not the case here, is an "information service". Therefore, *Brand X* compels that VoIP be treated as an "information service" unless it is identical to AT&T's IP-transport-only service.

2. The reason why Comcast VoIP isn't affected by Comcast's bandwidth-management practices is so obvious that I didn't even have to read Comcast's response to know why: Comcast VoIP, like virtually all other cable-VoIP services, uses a private IP network; it does not use the "provisioned bandwidth" of Comcast's broadband service, as non-Comcast VoIP services do. In fact, while cable (Comcast or others) broadband service is not necessary for cable VoIP service, it is necessary for outside VoIP services, as broadband is generally necessary for any VoIP service that uses the "public" Internet. Thus, the January 18 letter is fatally flawed, as Comcast VoIP is completely irrelevant to Comcast's bandwidth-management practices; it is nothing more than the WCB's own attempt to illegally extend its PSTN jurisdiction to cable VoIP (and as I will argue in paragraph 7, nearly all VoIP services).

3. The January 18 letter also attempts to use Comcast VoIP's use of a private IP network as a basis for declaring it a "telecommunications service". Ironically, that basis was rejected by one of the very FCC orders it relies on: In paragraph 17 of the *IP-in-the-Middle Order*, the FCC stated that commenters who made substantially the same argument (i.e., that AT&T's service should be exempt because it used the public Internet instead of a private IP network) "fail to explain why using the Internet, as opposed to a private IP network or some other type of network, is at all relevant to our analysis of whether AT&T's specific service should be assessed interstate access charges, *particularly here where AT&T merely uses the Internet as a transmission medium without harnessing the Internet's broader capabilities*" (emphasis added). Thus, the January 18 letter engages in exactly the sort of "arbitrage" the *IP-in-the-Middle Order* itself rejects. Furthermore, *Brand X* makes it clear that using a private "telecommunications" network does not turn an "information service" into a "telecommunications service"; the underlying "telecommunications" (i.e., Comcast's cable signal) is the same here as in *Brand X*.

4. The January 18 letter also seems to implicitly rest on the fact that the enhanced multimedia terminal adapter (EMTA) used by Comcast with its VoIP service contains an RJ11 jack which generates a dial tone, that permits PSTN CPE (such as phones and fax machines) to be used with Comcast VoIP. However, just because PSTN CPE can be connected to the EMTA does **not** change the fact that (a) the **EMTA** is the **only** CPE for Comcast VoIP and (b) the RJ11 jack is on the **customer-facing** side of the CPE. Thus, the EMTA's RJ11 jack – and everything connected to it (i.e., PSTN CPE) – is merely what the CPE (EMTA) **does** with the "telecommunications" signal as defined by *Brand X* (i.e., Comcast VoIP's private IP signal) **after** it receives it, and thus is **beyond** the FCC's jurisdiction per the D.C. Circuit's *American Library Association* decision, except for specific jurisdiction on other grounds (i.e., RF-spectrum use by cordless phones) inapplicable here. The mere fact that *ALA* involved a different facet of the FCC's jurisdiction (i.e., radio instead of wire communications) does not change the result, especially since the FCC claimed to adopt *ALA*'s "broadcast flag" rule under Title I ancillary jurisdiction; the same jurisdictional limits that compelled *ALA*'s result apply here. (In fact, since intrastate wire communications does not ordinarily interfere with interstate communications as radio does, FCC jurisdiction over wire is generally more limited than that over radio.) The *ALA* distinction between external and customer-facing CPE terminals is also supported by the regulatory scheme of *Brand X*.

5. Simultaneously with the *IP-in-the-Middle Order*, the FCC also issued the *Vonage Order* which declared cable VoIP (like Comcast) exempt from state regulation. It is hard to reconcile the *Vonage Order* with the *IP-in-the-Middle Order* without assuming that the FCC of 2004 intended to declare VoIP an "information service", but held off from doing so only because *Brand X* was still winding its way thru the lower courts; the *IP-in-the-Middle Order* was intended to be the exception to prevent misuse of the Internet by telcos to evade their responsibilities, not the rule for VoIP providers like Comcast. With *Brand X* now decided by the Supreme Court, it is now past time for the FCC to officially declare VoIP an "information service", just as it did for DSL.

6. The sole basis for the *IP-in-the-Middle Order* was that AT&T ultimately delivered the same signal to the customer (i.e., PSTN) that it received from the initiating party. That is not the case with Comcast VoIP because (a) the signal delivered to the customer is a private IP signal, not PSTN, and (b) just as the *Vonage Order* found for cable VoIP services in general, the "PSTN-like" dial tone provided by the EMTA is enhanced with non-dial tone services (i.e., voicemail also accessible via the Web). While AT&T offered no "net protocol conversion" on the customer's premises (i.e., the incoming signal was pure PSTN), the EMTA does provide that conversion.

7. Using a customer-facing RJ11 jack with dial tone to declare any VoIP service (including Comcast VoIP) a "telecommunications service" runs the risk of burdening all VoIP services with the same fate, which the FCC in the past has refused to do. Comcast is **NOT** the only VoIP service whose equipment has customer-facing PSTN interfaces (such as RJ11 jacks or built-in PSTN-like phones); so do other cable VoIP providers, VoIP components of telco video services (i.e., AT&T U-verse Voice), Vonage and other "interconnected VoIP" providers, and even VoIP providers like Skype & MagicJack who nominally separate incoming & outgoing services to avoid

"interconnected VoIP" jurisdiction. Indeed, since Vonage & Skype hardware is usually made by third parties under license, while some other VoIP providers use Session Initiation Protocol (SIP) for which third-party hardware is available, the vast majority of VoIP services can be used with PSTN CPE – whether the VoIP provider provides the interface (as with cable/telco VoIP & MagicJack) or not. Thus, the January 18 letter clearly prejudges virtually all VoIP providers as "telecommunications services", a result contrary to virtually all past FCC rulings, including the *VoIP E911 Order* which created "interconnected VoIP" jurisdiction under Title I.

8. That said, there is a reasonable place for an "RJ11 test" – to close loopholes in the FCC's jurisdiction over interconnected VoIP, not telecommunications service. As stated earlier, Skype & MagicJack offer their incoming & outgoing services separately; thus, they claim they are not subject to FCC "interconnected VoIP" jurisdiction. However, both services' adapters provide both incoming & outgoing services thru the same RJ11 jack. Furthermore, although Skype's separation of these services may have been originally intended as an "unbundling" innovation, both Skype & MagicJack are clearly being marketed as PSTN replacements – just like Vonage, Comcast (and other cable) VoIP, and other interconnected VoIP services. Indeed, with MagicJack this separation is clearly nothing more than an evasion of FCC rules, as they basically admit in claiming in describing their E911 service that they are not required to offer it – the most basic obligation of any interconnected VoIP provider, since the category was first created in the *VoIP E911 Order* for the purpose of requiring E911 in VoIP services. Therefore, I suggest that a separate docket be opened to require that any VoIP provider which provides both incoming and outgoing PSTN access (even if thru separate services) for use thru either PSTN CPE or PSTN-like hardware (i.e., a corded or cordless phone) be treated as "interconnected VoIP". (Though I don't think it's the right time yet to include PSTN-like telephony software, or "softphones", that use computer hardware exclusively – as opposed to softphones used with PSTN-like hardware, like Skype & MagicJack – this concept could later be extended to such softphones as well.) Thus, the FCC can use its interconnected VoIP jurisdiction to impose the same rules on almost all VoIP services that act as substitutes for PSTN, including universal service obligations (both current and future, as contemplated by the current NPRM extending disconnection-notice requirements to interconnected VoIP). Use of a "RJ11 test" here is appropriate because it does not attempt to extend FCC jurisdiction to the jack itself, unlike the January 18 letter and the "broadcast flag" rule overturned by *ALA*; such a service would be "interconnected VoIP" whether delivered thru an RJ11 jack or otherwise. (Also, interconnected-VoIP jurisdiction is partly based on the FCC's public-safety powers, unlike in *ALA*.)

Thus, the FCC should immediately (a) per *Brand X*, declare VoIP an "information service" exempt from Title II jurisdiction, unless delivered to the customer as a PSTN signal with no net protocol conversion on the customer's premises (as in the *IP-in-the-Middle Order*); (b) withdraw the enforcement action initiated by the January 18 letter as beyond the FCC's jurisdiction per both *Brand X* and *ALA*; and (c) initiate a rulemaking in a separate docket to extend interconnected-VoIP jurisdiction to all VoIP providers that provide both incoming and outgoing PSTN access through the same PSTN CPE or other PSTN-like hardware (or possibly software).