WC 09-193

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

FILED/ACCEPTED
SEP 25 2009
Federal Communications Commission
Office of the Secretary

In the Matter of	)	
National Association of Regulatory Utility Commissioners Petition for Clarification or Declaratory Ruling that No FCC Order or Rule Limits State Authority to collect Broadband Data	)	WC Docket No. _____

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS PETITION FOR CLARIFICATION OR DECLARATORY RULING THAT NO ORDER OR REGULATION ISSUED BY THE FEDERAL COMMUNICATIONS COMMISSION LIMITS STATE AUTHORITY TO COLLECT DATA DIRECTLY FROM ANY BROADBAND INFRASTRUCTURE OR SERVICE PROVIDER.

Pursuant to the Federal Communications Commission's ("FCC" or "Commission") General Rules of Practice and Procedure, Sections 1.41 and 1.2, 47. C.F.R. §§ 1.41, 1.2 (2008), the National Association of Regulatory Utility Commissioners[1] ("NARUC") respectfully submits this request for a clarification of its prior decisions and/or a declaratory ruling and/or an interpretive rule. Specifically, NARUC requests the FCC expeditiously clarify that *no FCC-issued order or regulation limits State authority to collect any data from any broadband infrastructure or service provider.*

In support of this request, NARUC states as follows:

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[1] Founded in 1889, NARUC's members include agencies in the fifty States, the District of Columbia, Puerto Rieo, and the Virgin Islands charged with regulating the rates and conditions of service of utility intrastate operations. NARUC members ensure that utility services are provided at rates and conditions that are just, and reasonable. Both Congress and federal courts have consistently recognized NARUC as a proper entity to represent the collective interests of State commissions. See, e.g., 47 U.S.C. § 410(c) (1971) (*Congress designates NARUC to nominate members to Federal-State Joint Boards to consider issues of concern to State regulators and the FCC on universal service, separations, and other issues*); See also 47 U.S.C. § 254 (1996) (*describing functions of the Universal Service Joint Board*). See also *NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (*where the Court explains "Carriers, to get the cards, applied to [NARUC], an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations the ICC issued to create the "bingo card" system*). See *United States v. Southern Motor Carrier Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), aff'd 672 F.2d 469 (5th Cir. 1982), aff'd en banc on reh'g, 702 F.2d 532 (5th Cir. 1983), rev'd on other grounds, 471 U.S. 48 (1985).

DISCUSSION

In a series of cases on DSL and cable modem services, the FCC determined that high-speed data services offered in tandem with access to the Internet "should exist in a minimally regulated environment."[2] Since those cases, as the attached July 2009 NARUC resolution specifies, several States initiated broadband mapping projects to identify served, underserved and unserved areas which have sometimes been frustrated by reliance on *voluntary* responses[3] to requests for granular broadband services data.

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[2] *In re Inquiry concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd 4798, ¶6 (2002), available online at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-77A1.pdf. The legal rationale of the order attracted a stinging critique from Commissioner Copps. The text of his dissent is available at http://www.fcc.gov/Speeches/Copps/Statements/2002/stmjc210.html. In the first order of the series, a 1998 decision on DSL services, the FCC recognized "some of the ISP traffic carried by [local exchange carriers high speed data services] may be destined for intrastate or even local Internet websites or databases," and that, because of its inseverability, the serviee "is subjeet to federal jurisdiction under the Commission's mixed-use facilities rule." *GTE Telephone Operating Cos. GTOC Tariff No. 1, GTOC Transmittal No. 1148*, 13 FCC Rcd 22466, ¶¶ 22-25 (1998), available online at: http://www.fcc.gov/Bureaus/Common_Carrier/Orders/1998/fec98292.pdf, *recon.*, 17 FCC Rcd 27409 (1999). (emphasis added) ("[I]n the *MTS/WATS Market Structure Order*, the Commission adopted the Joint Board's recommendation that "mixed-use" special access lines (*i.e.*, lines carrying both intrastate and interstate traffic) are subject to the Commission's jurisdiction where it is not possible to separate the uses of the special aceess lines by jurisdiction. The Commission found that special access lines earrying more than *de minimis* amounts of interstate traffie to private line systems should be assigned to the interstate jurisdiction. Interstate traffic is deemed *de minimis* when it amounts to ten percent or less of the total traffic on a special access line . . . We agree GTE's ADSL service is a special access service, thus warranting federal regulation under the "ten pereent" rule.")

[3] The July 30, 2009, filed comments of NTCA, at pages 5-6, filed in WC Docket 07-38, illustrate the point: "[S]ome providers may have inadvertently included confidential information that they would not have otherwise disclosed had they knows about the possible data release (to State commissions). (emphasis added), available at: http://fjallfoss.fcc.gov/prod/eefs/retrieve.egi?native_or_pdf=pdf&id_document=7019934056.

Compare, Dissent of California Public Utilities Commissioner Geoffrey Brown, *Order Adopting Report In Fulfillment Of Senate Bill 1563* Decision 05-05-013 May 5, 2005, available at: http://docs.cpuc.ca.gov/published/Final_decision/46430.htm, noting "carriers will tell you point blank . . . California has no right to subsidize DSL because DSL is an interstate service . . ."

See also, *February 27, 2007 Position Statement: Cable Telecommunications Association of Maryland, Delaware and the District of Columbia on Maryland House Bill Number 1069* - a bill that combined a net neutrality mandate with explicit broadband information collection requirements. The CTA, at page 1, claimed the bill is "preempted by federal law" and, at page 2, is "solving a non-existent problem", stating, "[t]he FCC already colleets information by zip code and posts detailed reports twice a year regarding the availability of broadband serviee. Commercial services . . . also monitor and report the date transmission rates of broadband providers." See also, *February 27, 2007 Position Statement: The Maryland Tech Council, on Maryland House Bill Number 1069* claiming, with respect to the entire bill, that "the [FCC] and the [FTC] currently exert authority over broadband and the Internet because the Internet communications are predominately interstate and international. Any attempt to regulate the Internet at the state level would prove impossible and most likely exceeds state authority." The advocacy documents do not – on their face distinguish between information collection and the net neutrality statements. The industry coalition was successful in defeating the entire measure and, apparently, gained considerable traction by the generic claim of preemption, although the legal memorandum associated with the lobbying had a narrower focus. I have attached a copy of both position statements as they are not available online.

At its summer meetings in Seattle, NARUC passed a resolution addressing several related issues. A copy of that resolution is appended as Appendix A. The resolution first asks the FCC, "in accord with the requirements of the Broadband Data Improvement Act ("BDIA" or "Act"),[4] to immediately provide requesting States with raw data from the relevant current Form 477 submissions from broadband service providers.[5] The resolution also asks the FCC to "immediately grant a petition for declaratory ruling affirming that: (1) it is an important aim of federal policy to expand the scope of available broadband services data; and (2) the FCC has not asserted any general preemption of any State actions requiring broadband service providers to submit specific information, at an appropriate level of granularity as determined by the State, on broadband service locations, speeds, prices, technology and infrastructure within the State. . ."

The touchstone for any FCC response to NARUC's request is Congressional intent.[6]

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[4] NARUC filed comments July 30 responding to the FCC's notice on the Broadband Data Improvement Act of 2008, Pub. L. No. 110-385, 122 Stat. 4097 (codified at 47 U.S.C. §§ 1301-1304). The BDIA text is available at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ385.110. The FCC notice - *Comment Sought on Providing Eligible Entities Access to Aggregate Form 477 Data As Required by the Broadband Data Improvement Act*, Public Notice, DA 09-1550, July 17, 2009, 74 Fed. Reg. 36446 (July 23, 2009) ("*Public Notice*") - is available online at: http://edocket.access.gpo.gov/2009/E9-17579.htm. NARUC July Comments are at: http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=7019934235.

[5] See, NARUC's July 30, 2009 initial comments *In the Matter of a National Broadband Plan for Our Future* GN Docket No. 09-51, at: http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=7019934178.

[6] "If the intent of Congress is clear, that is the end of the matter; for the . . . *agency*, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). {emphasis added} Even if the subject service has inseverable mixed inter/intrastate components, Courts will not allow preemption unless the FCC can support a claim the challenged actions are inconsistent with Congressional goals. See, e.g., *Qwest Corp. v. Scott*, 380 F.3d 367 (8th Cir 2004), addressing a State's imposition of service quality standards on an *INTER*state special access service: ""[B]ecause agencies normally address problems in a detailed manner and can speak through a variety of means, ... we can expect that they will make their intentions clear if they intend for their regulations to be exclusive." *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 718 . . .(1985). Reading all of the FCC's pronouncements concerning special access services, including this most recent notice of rulemaking, we do not discern an intent of the Commission as yet to preclude all state regulation of these mixed-use services." Available at: http://www.ca8.uscourts.gov/opndir/04/08/031489P.pdf. See also, President Obama's May 20, 2009 *Memorandum for the Heads of Executive Departments and Agencies*. Even though the memo targets Executive agencies, it still provides a useful template for FCC action: "[A]**gencies have sometimes announced that their regulations preempt State law . . .** without explicit preemption by the Congress or an otherwise sufficient basis under applicable legal principles . . . [It is] the general policy of my Administration that **preemption of State law by . . . agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis** . . .[t]o ensure that executive . . . agencies include statements of preemption in regulations only when such statements have a sufficient legal basis . . . agencies should not [1] include in regulatory preambles statements that the . . . agency intends to preempt State law through the regulation except where preemption provisions are also included in the codified regulation [2] . . . include preemption provisions in codified regulations except where

Fortunately, in at least three separate pieces of legislation, Congress has been crystal clear both that it wants to promote the deployment and adoption of advanced services – *and that it wants States to play a key role in those efforts.*

Moreover, the FCC, by imposing federal information collections on broadband deployment, has already confirmed both that collecting such information is consistent with Congressional goals,[7] and also, in at least two orders, *cited with approval existing State data collection efforts.*[8]

The Supreme Court specifies that: "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank v. Germain*, 503 U.S. 249 at 253-4(1992). This proscription applies with equal force to federal agencies. In Section 706, it is not difficult to discern Congressional intent. In that section, in 1996, Congress specifies that States (and the FCC) "***SHALL*** encourage the deployment...of advanced telecommunications capability," a term Congress defined:

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such provisions would be justified under legal prineiples governing preemption . . . and . . . should review regulations issued within the past 10 years that contain statements in regulatory preambles or eodified provisions intended by the . . . or agency to preempt State law . . . to decide whether such statements or provisions are justified under applicable legal principles governing preemption . . . BARACK OBAMA, {emphasis added – "bold" emphasis in original} available at: http://www.whitehouse.gov/the_press_office/Presidential-Memorandum-Regarding-Preemption/

[7] See *In re Deployment of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice Over Internet Protocol (VoIP) Subscribership*, "Notice of Proposed Rulemaking," 22 F.C.C.R. 7760 at ¶¶ 10–21, 39–47 (Feb. 26, 2007). The FCC subsequently adopted a March 19, 2008 order to "greatly improve the ability of the Commission to understand the extent of broadband deployment, and will enable the Commission to continue to develop and maintain appropriate broadband policies." *In re Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice Over Internet Protocol (VoIP) Subscribership*, "Report and Order and Further Notice of Proposed Rulemaking," 23 F.C.C.R. 9691, ¶ 1 (Mar. 19, 2008), available online at <http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-89A1.doc>. The FCC could clarify that nothing in this Report and Order, or any prior orders/rules limits State authority to access data.

[8] Id., 23 F.C.C.R. 9691, ¶34 "In the Data Gathering Notice, we . . . acknowledged the success of the ConneetKentucky initiative . . . *We note that the ConnectKentucky program, along with other efforts at the state level, has facilitated identification of areas without broadband service, and that this identification has resulted in public and private resources being focused to provide service to unserved areas."* {emphasis added}

> without regard to any transmission media . . . as high speed, switched, **broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video transmissions using any technology**. (emphasis added)[9]

In 47 U.S.C. § 254 (b), also enacted in 1996, the linkage between Congress's desire for States to promote advanced services and universal service is explicit. It *mandates* that the FCC explicitly base its policies to advance universal service (which includes both "advanced" and "information" services) on the existence of STATE mechanisms. [10]

The obvious prerequisite for effective State planning to promote deployment is access to information about what "broadband telecommunications capability" is available in each part of the State.

The FCC's actions to date confirm this view. None of its orders explicitly preempt – or condition - State data collection programs. Also, as noted infra, at least two FCC orders cite those State efforts with approval. In 2008, Congress made the obvious – explicit, finding that:

> "The Federal Government should also recognize and encourage complementary State efforts to improve the quality and usefulness of broadband data." 47 U.S.C. § 1301 (2008).

That legislation set up a grant program to funnel funds to the States to help them with State mapping programs. Significantly, there is no preemptive statement in the text of the BDIA, although it does require States that choose to accept the proffered federal funds to agree to the confidentiality requirements listed in the law.

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[9] Pub. L. No.104-104,110 Stat. 56, § 706 (codified in the notes to 47 U.S.C. §157) Section 706 must be read in *pari materia* with the Act's emphasis for access to such services for schools, libraries, and rural health care facilities, as well as the 47 U.S.C. § 254(c)'s requirement to periodically update what services can be supported by federal programs (and - necessarily the allowed state analogues).

[10] Specifically that section states: [T]he FCC SHALL base policies for the preservation and advancement of universal service on the following prineiples . . . (2) . . . Access to advanced services . . . (3). . .Consumers in all regions. . .including those in rural, insular, and high eost areas, should have access to telecommunications and information serviees, including . . . advaneed teleeommunications and information services, that are reasonably comparable to those services provided in urban areas. . .(5). . .There should be specific, predictable and sufficient Federal AND STATE mechanisms to preserve and advance universal service." 47 U.S.C. § 254 (b) (1996) (emphasis added)

Finally, earlier this year, Congress enacted "The American Recovery and Reinvestment Act of 2009, PL 111-5 (2009)", available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1enr.pdf, again confirming its interest in facilitating existing State mapping efforts and in instigating new ones.

CONCLUSION

States need this data.[11] There is no question that Congress wants States to have this data. A declaratory ruling - specifying only that no FCC order or regulation currently limits State authority to collect any data from any broadband infrastructure or service provider - will clear up any remaining ambiguity over the scope of existing State authority and facilitate State mapping, and other deployment initiatives.

Respectfully Submitted,

JAMES BRADFORD RAMSAY
General Counsel
National Association of Regulatory Utility Commissioners
1101 Vermont Ave, NW
Suite 200
Washington, DC 20005
202.898.2207 Direct Dial
202.257.0568 Cell phone
jramsay@naruc.org E-Mail

September 25, 2009

[11] According to NARUC's resolution, States need broadband services information on service locations, speeds, prices, technology and infrastructure from wireline and wireless broadband service providers to: "accurately measure the progress in improving access to and adoption and use of broadband services in their States, assess the impact that broadband service has on rural, low-income, unemployed, aged, disabled and otherwise vulnerable consumers, analyze the effects of broadband infrastructure deployment initiatives on schools, libraries, medical and healthcare providers, community colleges and other institutions of higher learning, community support organizations and public safety agencies, and target State, regional and local-level policy initiatives and incentives to increase broadband service deployment and adoption rates."

Appendix A - ***Resolution Supporting Access to Broadband Mapping Data***

WHEREAS, States need broadband services information on service locations, speeds, prices, technology and infrastructure from wireline and wireless broadband service providers in order to: Accurately measure the progress in improving access to and adoption and use of broadband services in their States, Assess the impact that broadband service has on rural, low-income, unemployed, aged, disabled and otherwise vulnerable consumers, Analyze the effects of broadband infrastructure deployment initiatives on schools, libraries, medical and healthcare providers, community colleges and other institutions of higher learning, community support organizations and public safety agencies, and Target State, regional and local-level policy initiatives and incentives to increase broadband service deployment and adoption rates; *and*

WHEREAS, The Board of Directors of the National Association of Regulatory Utility Commissioners, convened at its February 2009 Winter Meetings in Washington, D.C., adopted a resolution recognizing the critical role the States have in gathering the necessary broadband services data to determine unserved and underserved areas within their borders; *and*

WHEREAS, The Federal Communications Commission (FCC) found both digital subscriber line (DSL) and cable modem services – that provide access to the Internet – are "information services" and that "courts have recognized the Commission's authority under Title I to preempt non-federal regulations that negate the Commission's goals;" *and*

WHEREAS, Absent federal preemption, States have legal authority to collect broadband services data; *and*

WHEREAS, It is clear from sections 706 and 254 of the Telecommunications Act of 1996 (47 U.S.C. §706 and §254), as well as the express terms of the Broadband Data Improvement Act (P.L. 110-385, 122 Stat. 4096 (2008)) (the BDIA), encouraging "complementary State efforts to improve the quality and usefulness of State data" and the American Recovery and Reinvestment Act of 2009, (P.L. 111-5, 123 Stat. 115 (2009)) that Congress's expressed goals are that States will both: (i) promote the deployment of advanced infrastructures and information services themselves, and (ii) collect information to assist State and Federal efforts to map the current and ongoing state of the deployment of broadband services; *and*

WHEREAS, NARUC disagrees with those who argue that because the FCC has preempted *some* State authority to regulate wireline and wireless broadband service providers, the FCC has also preempted the States' authority to require broadband service providers to submit information on service locations, speeds, prices, technology and infrastructure within the State; *and*

WHEREAS, Several States initiated broadband services mapping projects to identify served, underserved and unserved areas which have been frustrated by reliance on *voluntary* responses to requests for granular broadband services data; *and*

WHEREAS, The NARUC Board of Directors, convened at its July 2007 Summer Meetings in New York, New York, adopted a resolution that requested the FCC to delegate authority, at the States' option, for broadband services data collection and analysis purposes; *and*

WHEREAS, The BDIA, at 47 U.S.C. §1304(h), directs the FCC to provide States with the aggregate broadband services data collected by the FCC based on the Form 477 submissions of broadband service providers; *and*

WHEREAS, On March 19, 2008, the FCC adopted a Report and Order, WC Docket No. 07-38, to require wireline and wireless broadband service providers to file modified semi-annual FCC Form 477 reports that will show the number of broadband connections in service in individual Census Tracts, the broadband service speed data in conjunction with subscriber counts according to new categories for download and upload speeds, and, for mobile wireless broadband service providers, the number of subscribers whose data plans allow them to browse the Internet and access Internet content; *and*

WHEREAS, The FCC received the modified Form 477 reports for data for the period July 1, 2008, through December 31, 2008, from all wireline and wireless broadband service providers on or before March 16, 2009, *and*

WHEREAS, The FCC denies States' requests for up-to-date copies of the dis-aggregated Form 477 reports filed by individual wireline and wireless broadband service providers that provision service in their States and, currently, will only provide copies of the outdated Form 477 reports with aggregated data for the period July 1, 2007 through December 31, 2007; *and*

WHEREAS, On July 1, 2009, the National Telecommunications and Information Administration (NTIA) released a Notice of Funding Availability (NoFA) for the State Broadband Data and Development Grant Program that makes grants available to the States "to fund their collection of broadband-related data . . . to develop statewide broadband maps, which will be linked to a Department of Commerce webpage." And, "In addition, the (State grant) awardees will submit all of their collected data to NTIA for use by NTIA and the FCC in developing and maintaining the national broadband map, which will be displayed on an NTIA webpage before February 17, 2011." And, the NoFA concluded that "State participation is critical to the national broadband mapping effort;" *and*

WHEREAS, Even though the NoFA provides that "In order to promote the efficient creation of the State and national broadband maps, NTIA and RUS [the Rural Utilities Service] will require that broadband Internet service providers that apply for infrastructure grants under BTOP [the NTIA's Broadband Technology Opportunities Program] and RUS' Broadband Initiatives Program (BIP) agree to provide the data that awardees under this Program [the State Broadband Data and Development Program] are required to collect" there will likely be many broadband service providers that do not apply for BTOP or BIP funding and will, thus, not be required to submit necessary broadband mapping data to the States; *now, therefore be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners, convened at its Summer 2009 Meetings in Seattle, Washington, requests the FCC, in accord with the requirements of the BDIA to immediately: (1) provide States that so request with disaggregated data from the relevant current Form 477 submissions by wireline and wireless broadband service providers; (2) require broadband service providers to simultaneously file future Form 477 reports with both the FCC and the requesting States; and (3) condition the aforementioned on a State's commitment to treat such Form 477 reports as privileged or confidential, as a record not subject to public disclosure except as otherwise mutually agreed to by the broadband service provider; *and be it further*

RESOLVED, To promote regulatory certainty, the FCC should immediately grant a petition for declaratory ruling affirming that: (1) it is an important aim of federal policy to expand the scope of available broadband services data; and (2) the FCC has not asserted any general preemption of any State actions requiring broadband service providers to submit specific information, at an appropriate level of granularity as determined by the State, on broadband service locations, speeds, prices, technology and infrastructure within the State, provided such State agrees to provide a minimum level of data confidentiality and protection as required by the BDIA, at 47 U.S.C. §1304.

Sponsored by the Committee on Telecommunications
Adopted by the NARUC Board of Directors, July 22, 2009

Appendix B – Memoranda referenced in Footnote 3, supra.

[redacted]

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TECH
Council MD

POSITION STATEMENT

9700 Great Seneca Highway
Rockville, MD 20850
P: 240-453-6200
F: 240-453-6201
www.techcouncilmd.com

HB 1069 – Public Service Commission - Broadband Internet Service
House Economic Matters
February 27, 2007
Oppose

The Tech Council of Maryland, a non-profit membership organization with over 500 high technology firms, government laboratories, higher education institutions and business support firms that collectively form Maryland's technology and biotechnology communities, opposes HB 1069 – *Public Service Commission - Broadband Internet Service.*

This bill requires excessive regulation of the Internet and may have the unintended consequence of discouraging investment in broadband deployment in Maryland. The development of broadband, especially in rural areas of Maryland, is a top priority of the Tech Council of Maryland. Furthermore, the Federal Communications Commission and the Federal Trade Commission currently exert authority over broadband and the Internet because Internet communications are predominantly interstate and international. Any attempt to regulate the Internet at the state level would prove impossible and most likely exceeds state authority. In fact, the United State Congress already rejected this issue last year.

Again, the Tech Council of Maryland respectfully urges the House Economic Matters Committee to give HB 1069 an unfavorable report.

Appendix B (Continued) – Memoranda referenced in Footnote 3, supra.

February 27, 2007
POSITION STATEMENT

CABLE TELECOMMUNICATIONS ASSOCIATION OF MARYLAND, DELAWARE AND THE DISTRICT OF COLUMBIA, INC.

HB 1069 – PUBLIC SERVICE COMMISSION – BROADBAND INTERNET SERVICE

BEFORE THE ECONOMIC MATTERS COMMITTEE

The Cable Telecommunications Association of Maryland, Delaware and the District of Columbia represents cable companies serving nearly 1.4 million customers in Maryland. The cable television industry offers advanced digital services, such as high-speed Internet access, digital cable, video-on-demand, and telephone service.

WE URGE YOU TO OPPOSE HB 1069!

The proposed legislation to regulate the Internet and to require reporting on the availability of broadband service in Maryland is a solution in search of a problem – it is unnecessary, duplicative of federal activity, and has unintended consequences that will ultimately harm consumers.

HB 1069 – PREEMPTED BY FEDERAL LAW.

This is a federal matter. The US Congress considered and rejected this type of legislation last year. The Federal Communications Commission (FCC) has authority over broadband services due to its national and international nature. State regulation of broadband service would create a patchwork of rules that undermine technological developments. Paul Glist, Esquire, partner with Davis Wright Tremaine, LLP, concludes that ***HB 1069 is preempted by federal law.*** In short,

> **"This measure, if enacted, would conflict directly with federal law and policy governing the nature and classification of broadband Internet services. The proposal would inappropriately impose state authority over a service that is interstate in nature, and subject to the exclusive jurisdiction of the Federal Communications Commission ("FCC"). The measure would clearly contravene Congress' stated policy of keeping the Internet free from regulation. For these reasons the proposal is preempted by federal law."**

Mr. Glist's entire Memorandum is attached for your review.

2530 Riva Road • Suite 316 • Annapolis, MD 21401 • (410) 266-9111
Baltimore (410) 974-6206 • Washington Metro Area (301) 970-2309 • FAX (410) 266-6133

SEP. 8. 2009 4:10PM NATIONAL PARTNERSHIP NO. 7828 P. 1

HB 1069 - "SOLVING" A NON-EXISTENT PROBLEM.

The underlying assumption of the bill is that broadband service providers will block access to some services provided over the Internet. Cable companies never have and never will block access to any lawful content, application or service available over the public internet. The FCC and the Federal Trade Commission (FTC) are both actively engaged in issues to protect Internet customers while encouraging broadband deployment and preserving the open nature of the Internet. The FCC already collects information by zip code and posts detailed reports twice a year regarding the availability of broadband service. Commercial services such as BroadbandReports.com also monitor and report the data transmission rates of broadband providers.

HB 1069 -- BAD FOR CONSUMERS.

Regulating the Internet leaves the consumer with the costs for future upgrades and expansions. The broadband market is still evolving but this bill eliminates possible business models that could benefit consumers. No regulation of the Internet has led to great investment, with $2.5 billion in Maryland from the cable industry since 1996. That investment by broadband providers is what has given rise to new bandwidth intensive services. With bandwidth usage growing at a rapid pace, continued investment will be needed to keep broadband services robust. Any change to this policy could have serious repercussions to continued network innovation and investment. Many broadband providers price services in "tiers," charging more for consumers who use more bandwidth or who seek priority delivery of certain traffic and thus consume more network resources. This bill would forbid the recovery of any network costs from firms at the "edge" who create network congestion or demand more priority bandwidth for real-time applications. The bill forces all costs of network development exclusively onto consumers, thus frustrating the development of such business models as priority delivery or priority advertising, which could help shift costs away from consumers. There is no reason that bandwidth intensive service providers should be given special protections against bearing any of the costs that they create. Broadband providers should be left free to innovate in the business models and pricing they employ, so that consumer demand can be met dynamically as it continues to evolve and change.

HB 1069 - UNINTENDED CONSEQUENCES.

The bill could cause a laundry list of unintended consequences. The onerous reporting requirements in HB 1069 will discourage deployment of broadband services throughout Maryland, especially in rural and underserved areas. The reported data is of a proprietary nature yet the PSC is required to post it on the Internet. A broadband service provider is more likely to invest capital in jurisdictions without HB 1069's burdens.

HB 1069 regulates network management with hazardous results. Restrictions would prohibit the use of broadband networks for new applications such as telemedicine which might require dedicated network capacity. The bill could prohibit network operators from restricting traffic

that is harmful, such as viruses, worms and spam. Network management issues should not be controlled by the government.

The bill would prevent creative business solutions for tomorrows Internet. Offering a guaranteed, expedited delivery speed is essential for some services—like voice telephony, or video entertainment—while other services operate well on a "best efforts" network basis. The bill would prevent the pricing of access to content or applications providers according to priority of delivery. If broadband providers are to continue to make these investments, and if consumers are going to be given the levels of services and innovative new products and features they desire, all at prices they can afford, broadband providers need to have continuing flexibility to develop new business models and pricing plans. Websites and content providers also need the flexibility to experiment with business models, and to partner with broadband providers where appropriate.

Network neutrality regulations would lead to endless and expensive litigation. Even assuming appropriate regulations could be written – highly unlikely in an area of rapid technological change – they would still lead to uncertainty and to the creation of a new bureaucracy to apply such rules.

CONCLUSION.

Proponents of HB 1069 will call it "network neutrality" and suggest there is a need to regulate the Internet. However, this proposed regulation of the internet would ultimately harm consumers, stifle investment, chill innovation and cost Maryland jobs.

WE URGE THE COMMITTEE TO OPPOSE HB 1069.